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• Current Events •

Committee on Professional Ethics Promulgates Opinion on Radio "Good Will Court"—Holds Participation of Judges or Attorneys Improper—Unauthorized Practice Committee Also Condemns Broadcast

THE Committee on Professional Ethics and Grievances at its first meeting of the new year, held in Chicago on November 13, 14 and 15, with all members present, promulgated an important and interesting opinion relating to the radio broadcast known as "The Good Will Court," in which it strongly condemned the participation of judges and lawyers in commercially sponsored programs which simulate court proceedings. The Committee also expressed its disapproval of lawyers participating in broadcasts in which legal advice is given in response to questions sent in, even though the statements are general in character. The manifest effect will be that the inquirer will be tempted to act in reliance upon the advice. Moreover, the lawyer who engages in such activity may possibly be aiding the sponsor who pays him for so doing in the illegal practice of the law. The decision of this matter, however, is not within the province of the Committee.

A week later the Committee on Unauthorized Practice of the Law, also meeting in Chicago, condemed the same broadcast as giving "quack legal advice." "By statutes and common law principles, corporations and non-lawyers are forbidden to furnish legal advice and service," the committee declared, "because of the danger to the public, just as 'quack' doctors are prohibited from practising medicine, and the radio is thus being misused in a manner which in many states would be clearly unlawful and improper. This is particularly so in view of the fact that people asking advice through this 'Good Will Court' are entirely deprived of the usual accepted safeguards and protections to which they are entitled and, if misled, have no recourse against the sponsors or others connected with the program."

Following is the text of the opinion of the Ethics Committee:

Opinion No. 166

(November 15, 1936)

Judicial Ethics—Radio Broadcasts.—The participation by a Judge, or the use of his name in a commercially sponsored radio program purporting to be for the benefit of the public through the giving of legal advice to indigent persons is contrary to the standards of behavior prescribed by the Canons of Judicial Ethics.

Professional Ethics—Duties of Attorneys.—It is improper for a former Judge or an attorney to participate in, or permit the use of his name in a commercially sponsored radio program purporting to be for the benefit of the public through the giving of legal advice by a judge to indigent persons.

Our attention has been directed recently to the radio program sponsored by a national advertiser, broadcast weekly over the national network of a large broadcasting company, entitled "Good Will Court." The announced purpose of the "Good Will Court" is to afford to indigent persons, unable to pay for the services of attorneys, means of securing advice with respect to their legal problems from judges of courts which are an integral part of the judicial system of the state, and to "inform the public." The obvious purpose is to promote the sales of the advertiser's product. Other programs of like nature are broadcast by individual radio stations elsewhere in the country.

The essential features of these programs are the appearance of the anonymous "clients," the assistance of an interlocutor who may or may not be an attorney, the stating of their "cases" to the judge, whose name is always prominently mentioned, and finally the advice and comments of the judge. In an hour's program ten or more "cases" may be thus disposed of, the proceedings being interspersed with the usual station announcements, reference to the name of the sponsoring advertiser and to the product which he sells. In many instances there is a proffer of further advice or assistance to the "clients." Quite often the programs are marked by discussions between the judge and the interlocutor, both as to the facts and the law, and by emotional outbursts of the "clients." The case is conducted so as to create the impression that usual court procedure is being followed, but the simulation is poor indeed and tends to create false impressions in the minds of the lay public respecting court procedure.

We are asked to state our views as to the propriety of the participation therein by judges, former judges, and attorneys.

The Committee's opinion was stated by MR. MCCOY, Messrs. McCracken, Sutherland, Phillips, Arant, Bane and Houghton concurring.

At the outset we deprecate the simulation of an actual judicial proceeding by a group of lawyers or judges, and especially one having for its primary purpose the advertising of an article of commerce. It is an affront to the dignity of judicial tribunals and should not be tolerated. It is the unqualified opinion of this Committee that no judge or former judge nor any other member of the bar should participate in any such commercial program. "Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well-tuned cymbal." Another vice of such programs is the tendency to give to the public a distorted idea of the way in which judicial proceedings should be conducted and of the judicial function.

While the question here presented is of paramount importance, the answer is plain. The most important character in these programs is the judge. The judicial office circumscribes the personal conduct of the judge. Canon 1, Canons of Judicial Ethics. The personal behavior of the judge, "not only upon the Bench and in the performance of his judicial duties, but also in his every day life, should be above reproach," and he should not use "the influence of his name to promote the business of others." Canons 4, 25 and 34. The American Bar Association adopted these Canons in 1924, as a proper guide and reminder for judges, "and as indicating what the people have a right to expect from them."

The judge who participates in, or lends his name to, radio programs such as we are here considering obviously violates these Canons.

Moreover, the commercial character of the program, the absence of any opportunity to hear the other side of the case, and the patent exploitation of the intimate and distressing problems of the anonymous "clients," can only be viewed as an effort "to change what should be the most serious of human institutions either into an enterprise for the entertainment of the public or one of promoting publicity for the judge." Opinion 67. Because of the divergence in the laws of the several states, the advice given by the judge is apt to be misleading to listeners in states other than in the state of origin.

These objections are no less real although the proceedings are not conducted in open court, since the "clients" and those who listen to these programs may think they are getting advice of a duly constituted court. In fact, authentic information has come to the Committee that such has been the result. Obviously the "clients" have no recourse when they have been wrongly advised. The whole affair is manifestly prejudicial to the due administration of justice. The fact that the judge gives the money he receives for his part in the performance to some worthy charity, does not condone the improper practice.

In a large measure, the same injurious results follow even though the role of the court in such programs is assumed by one who is a former judge or an attorney. We are therefore of the opinion that it is not proper for an attorney or former judge to participate in such radio programs, nor permit the use of his name. The part he takes is calculated to lower the esteem of the profession, and to stir up legal strife, and may be considered a subtle method of seeking employment. Opinion 121. Our present economic structure justifies the maintenance by the organized bar of the modern legal aid clinic to aid the individual lawyer in the discharge of his obligation, but cannot justify its alleged counterpart in the commercial field of radio entertainment.

We refrain from expressing any opinion on the question of whether these programs involve the unlawful practice of the law. That question is not within the jurisdiction of this Committee.

Harris & Ewing

Committee Chairmen for 1936-37: Left, John Lord O'Brian, Chairman of Labor, Employment and Social Security Committee. Right, John Perry Wood, Chairman of Committee on Judicial Selection and Tenure.

Notice to Members

THE Assembly of the American Bar Association at the Boston meeting adopted a resolution that there be prominently published in this Journal the fact that the 1936 report of the Special Committee on Administrative Law will appear in full in the annual year book of this Association to the end that there will be no reason why the whole membership shall not have adequate opportunity to be fully informed when this very grave matter comes up for attention. Also, the Chairman of that Committee has sent and is sending from time to time to all members of the House of Delegates various printed documents pertaining to the work of that Committee and the members of said House are requested to study them carefully and pass them on to other members of the Association as it is impossible for him to send copies to all members of the Association.

Meeting of Federal Communications Bar Association

THE Federal Communications Bar Association, which was organized in Washington in June, 1936, held a dinner and meeting at the National Press Club, Washington, D. C., on Wednesday evening, November 18, 1936. Over sixty were present. Among the guests were Mr. Justice Owen J. Roberts of the United States Supreme Court, Honorable John Dickinson, First Assistant Attorney General, Honorable Anning S. Prall, Chairman of the Federal Communications Commission, and five of the other six members of the Commission, Messrs. Sykes, Case, Stewart and Brown. Also present was the general counsel, Mr. Hampson Gary, and Colonel Davis G. Arnold, Chief Examiner. Louis G. Caldwell, President of the Association, presided.

The speaker of the evening was Honorable Clyde B. Aitchison, of the Interstate Commerce Commission, who

delivered an address on the functions and purposes of such an organization. Commissioner Aitchison was largely instrumental in the formation of the Association of Practitioners before the Interstate Commerce Commission, which organization has been highly successful and useful.

The Federal Communications Bar Association now has in excess of 140 members, or about one-third of all attorneys admitted to practice before the Federal Communications Commission. By action taken at a recent meeting of its Executive Committee, it has determined to publish a regular monthly journal, the first issue of which will appear January 1st, 1937. In addition to accounts of Association activities, the journal will contain information of interest to lawyers practicing before the Commission. In size and scope it will follow very closely the model set by the similar journal published by the Association of I.C.C. Practitioners.

Committee On Law Lists Will Hear Lawyers

The Special Committee on Law Lists, of the American Bar Association, will hold a meeting in Chicago during the week of December 13th, at a date to be announced later, at which time any lawyers who are interested in appearing and giving the committee the benefit of their views upon any phases of the law list problem will be given a hearing. Representatives of bar associations, committees, or other groups of lawyers will be welcome as well as individual lawyers who merely speak for themselves.

The committee is anxious to have as much information as possible on the subject it is considering, and this meeting is designed to give the lawyers a chance to be heard. The committee has heretofore held a meeting at which law list publishers were given the same opportunity. Any lawyer interested in appearing should communicate with the chairman of the committee, Mr. Earle W. Evans, First National Bank Building, Wichita, Kansas.

New Tax Regulations

The Bureau of Internal Revenue and Treasury Department have issued two separate general regulations, No. 94 being the general income tax regulations under the Revenue Act of 1936, and No. 91 being the regulations under Title VIII of the Social Security Act and relating to the income tax on employees and the excise tax on employers. Both of these Regulations will be available now or very soon at the offices of the several Collectors of Internal Revenue.

Important Constitutional Questions Involved in "Duke Power Company Case"—Right of Federal Government to Make Loan to County for Construction of Hydro-Electric Plant Challenged

THE right of the Federal Government, through the Public Works Administration, to make a loan and grant to Greenwood County, S. C., for the construction of a hydro-electric plant, to be operated in competition with private enterprises in that territory, under the provisions of title II of the National Recovery Act, and under the terms of the agreement entered into between the United States and the county, is involved in the case of Duke Power Company and Southern Public Utilities Company, Petitioners, vs. Greenwood County, et al and Harold L. Ickes, as Federal Administrator of Public Works, Respondents (No. 32).

Procedural Questions May Be Decisive

The case was argued before the United States Supreme Court on Nov. 10, on appeal from the decision of the Circuit Court of Appeals for the Fourth Circuit, which sustained the Government's contention, overruling the decision of the District Court. Certain procedural questions as to the action of the Circuit Court of Appeals in remanding the cause, on the first appeal, to the District Court, and to its rulings and order entered on the second appeal, are involved and may possibly be decisive. Moreover, the right of the petitioners to sue, under the circumstances of the case, is challenged by the Government and this important point is argued in extenso in briefs of Petitioners and Respondents. Assuming that these contentions are settled in a way to require a consideration on the merits, some very important constitutional questions as to the Government's PWA program will have to be settled.

Brief for Petitioners

The brief for the Petitioners claims that Title II of the National Industrial Recovery Act, under which the Federal Administrator of Public Works claims the right to make the grant in question, is unconstitutional and void "as applied to the challenged loan and gift of Federal money" because "(a) it is an unauthorized delegation of legislative power. (b) the general welfare clause...does not authorize gifts and so-called loans of federal funds for the construction of a plant for the manufacture and local intrastate distribution of electricity. (c) in any event, the general welfare clause does not authorize the appropriation of money borrowed on the credit of the United States under Art. 1, Sec. 8, Cl. 2 of the Constitution for the construction of local electric power plants, or any purpose other than in furtherance of the enumerated powers. (d) the Act, as construed and applied to the instant case, is beyond the powers of the Federal government and violative of the Tenth Amendment in that, if permitted to be given effect, it would supplement and supplant lawful state regulations with unlawful Federal regulation of intrastate electric power rates and local terms and conditions of labor." Petitioners further contend that Title II of the National Industrial Recovery Act does not in its terms authorize the gifts and loans for the purpose mentioned.

Unconstitutional Delegation of Legislative Power

The argument in the Petitioner's brief, that Title II is an unconstitutional delegation of legislative power, takes up certain "elements of congressional action necessary to satisfy the constitutional prohibition," as set forth in *Panama Refining Co. v. Ryan* (293 U. S. 388 and *Schechter Corp. v. United States*, 295, U. S. 495) and tests the pertinent provisions of the National Industrial Recovery Act by these rules. It concludes that "in essence, the Act attempts to delegate to the President the power to engage in such works and to assist such works as he sees fit or deems helpful for the relief of unemployment. This leaves the subject matter wholly undefined." Further, "other than certain provisions with reference to labor conditions . . . there is no prescription by the Congress whatsoever of the action to be taken by the President in respect to construction, financing or aiding any project included in the indeterminate units of Section 202."

Act Does Not Define and Prescribe Conditions

It further concludes that the Act does not define and prescribe the conditions which are to determine when the Executive shall act or not act, and what action shall be taken upon the finding of the appropriate statutory conditions. In addition, the statute makes no provision for administrative findings "so that whether the executive officer has in fact acted in accordance with the congressional will, or merely in the exercise of an undefined personal discretion, may be determined."

No Authority Under General Welfare Clause

Petitioner's argument as to the lack of authority under the General Welfare Clause for the grant and loan in question is based, in the first place, on the ground that "the power of taxation and appropriation may only be exercised under the Constitution for a general not local, national not state, and public not private, purpose and benefit." The enterprise to which the grant and loan were made in this case, it insists, is essentially local in character and "the Federal Government by a mere multiplication of its excursions into matters of strictly local concern cannot convert them into matters of National concern or general welfare, and hence, constitutional objects of Federal appropriations."

Petitioners also maintain that the General Welfare Clause "has no application to moneys borrowed on the credit of the United States under Article I, Section 8, Clause 2, of the Constitution; and such borrowed funds may not in any event be appropriated for the construction of local electric power plants, or for any purpose not in furtherance of the enumerated powers." "It seems manifest," the brief continues, "that the framers of the Constitution made a deliberate distinction between the power to appropriate money raised by taxation and the power to appropriate borrowed funds. No power to appropriate borrowed funds other than in execution of the enumerated powers was granted."

The argument is also made that "Title II of the National Industrial Recovery Act, as construed and applied to the instant case, is beyond the powers of the Federal Government and violative of the Tenth Amendment in that, if permitted to be given effect, it would supplement or supplant lawful State regulation with unlawful Federal regulation of intrastate electric power rates and local terms and conditions of labor." This ends the Constitutional argument. The rest of the brief is devoted to the argument that the National Industrial Recovery Act, properly construed, does not attempt to authorize the gift and loan in question.

The Right to Sue

Regarding the right of Petitioners to sue, dealt with earlier in the argument, the brief asserts that "the record establishes that the property and business of Petitioners will be irreparably injured, if not destroyed, by the use of Federal funds for the construction of a local electric utility in Greenwood County, South Carolina; and if such use of Federal funds be unauthorized or unconstitutional, the right of the Petitioners to maintain this suit and to injunctive relief is clear." The brief continues:

"Petitioners rely upon the principle that one threatened with direct and special injury—not common to the public generally—through the application of an unconstitutional statute or through an unauthorized act of a Federal officer, may seek protection from the courts. In short, every citizen has a right to be free from special injury through the application of unconstitutional statutes or the unconstitutional action of Federal officers and every Federal officer owes a corresponding duty not to inflict special injury upon a citizen through unconstitutional action. Whenever this right has been invaded and the corresponding duty has been breached, a citizen may maintain an action and is entitled to injunctive relief. *Frothingham v. Mellon*, 262 U. S. 447, 448."

Summary of Argument for Government

The summary of the argument for the Federal Administrator of Public Works, Respondents, is set forth in the brief of counsel as follows:

"Petitioners have no standing to attack the constitutional and statutory validity of the proposed loan and grant. Those questions are relevant only if it is shown that the respondent Administrator, regarded as a private individual, is threatening a violation of a legally protected interest of petitioners. Such is the basis upon which suits against government officers may be maintained despite the immunity of the sovereign. *In re Ayers*, 123 U. S. 443, 494-502; *Morrison* v. *Work*, 266 U. S., 481; *Massachusetts* v. *Mellon*, 262 U. S. 447; *Goltra* v. *Weeks*, 271 U. S. 536. As taxpayers petitioners cannot complain since, as they apparently concede, they will suffer no demonstrable damage in that capacity. As franchise holders they can complain only of threatened unauthorized competition, as in *Frost* v. *Corporation Commission*, 278 U. S. 515. The competition is that of the County, and is concededly lawful under South Carolina law and under the Federal Constitution. That it is made possible by advances of funds by third parties alleged to be acting beyond their lawful authority gives no additional rights to petitioners. Cf. *Railroad Co.* v. *Ellerman*, 105 U. S. 166. And that the third party is a public officer likewise gives petitioners no greater right to complain. Cf. *Edward Hines Trustees* v. *United States*, 263 U. S. 143; *Sprunt & Son* v. *United States*, 281 U. S. 249; *Chicago Junction Case*, 264 U. S. 258.

"Cases holding that third parties are answerable where they induce another by fraud or intimidation or with a solely malicious motive, to cause damage to a plaintiff, have obviously no application to the case at bar. The Administrator has not induced the County to undertake the project: he will have no control over its operations; his only relation to it will be that of a lender holding bonds payable out of revenues.

"In holding that the petitioners are without standing to challenge the loan and grant, the decision below accords with the decisions in *Arkansas-Missouri Power Company* v. *Kennett* 78 F. (2d) 911 (C.C.A. 8th); *City of Allegan* v. *Consumers Power Co.*, 71 F. (2d) 477 (C.C.A. 6th), certiorari denied, 293 U. S. 586; *Kansas Utilities Co.* v. *City of Burlington*, 141 Kans. 926, petition for certiorari dismissed on motion of petitioner, 296 U. S. 658. No appellate court has held otherwise.

Statute Authorizes Loan and Grant

"The proposed loan and grant are authorized by the statute. The contention that electric power projects, or competitive projects generally, were to be rejected, is answered by the terms of the statute, by its legislative history, and by its administrative construction, which has met with uniform judicial approval and has been confirmed by at least three subsequent enactments. An amendment which would have excluded competitive projects was rejected in connection with the Emergency Relief Appropriation Act of 1935, which continued the existence of the Public Works Administration. Such an amendment would virtually have destroyed the purpose of the statute to create widespread employment through a comprehensive program of public works, since almost all public works projects, including schools, bridges, auditoriums and the like, are competitive in greater or less degree with private undertakings.

No Unlawful Delegation of Legislative Power

"The statute does not unlawfully delegate legislative power to the Administrator. It requires a comprehensive program of public works to be undertaken and enumerates various classes of eligible projects. It sets a limit on the relative amount of a grant and requires loans to be reasonably secured; this in turn requires that the project be sound from a legal and engineering standpoint, and, in the case of public borrowers, that the project be duly authorized by sovereign action. There is thus no want of standards or declared policy in the statute. Cf. *United States* v. *Schechter Corporation*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

"Moreover, the provisions in question are not coercive or regulatory, as were those involved in both cases cited

above. The present case involves a field of action comparable to the administration of public lands (*Butte City Water Co.* v. *Baker*, 196 U. S., 119; *United States* v. *Grimaud*, 220 U. S. 506, 516; *United States* v. *Hanson*, 167 Fed. 881 (C.C.A. 9th)); the establishment of fiscal agencies (*McCulloch* v. *Maryland*, 4 Wheat. 316); the disposal of government property (*United States* v. *Chemical Foundation*, 272 U. S. 1; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288); and the borrowing of money on the credit of the United States, in all of which relatively greater discretion has been permitted to the executive.

"The Constitution does not require that appropriation Acts shall specify in detail the manner in which the executive function of expenditure shall be performed. This conclusion is supported by the language of the Constitution, by the English practice upon which the founders drew, and by consistent Congressional practice from the beginning of the Government. The degree of particularity with which expenditures are authorized is a matter of legislative policy.

Statute Valid Under General Welfare Clause

"The statutory provisions are a legitimate exercise of the power to appropriate money to promote the general welfare. The Court has taken judicial notice of the depth and severity of the depression existing at the time of the enactment of the statute. With unemployment at a menacing level, and the resources of private charity and local aid grossly inadequate, Congress undertook to cope with the situation through its power of appropriation. In endeavoring to increase employment by means of a program of public works, Congress recognized the fact that the construction industry is a key industry in relation to employment and had suffered the most drastic decline. The encouragement of public works as a remedy for unemployment had been advocated by business leaders and economists, and had been previously adopted both in this country and abroad. The results confirm the appropriateness of the means chosen. See *Monthly Labor Review*, October, 1936 (United States Department of Labor). Petitioners do not contend, nor could they, that the public works provisions were valid when enacted but are no longer justified by existing conditions.

"The fact that incidental local benefits will result through the use of the projects cannot affect the fact that Federal aid in their construction is part of a comprehensive national program of public works appropriately designed to promote the general welfare. *United States* v. *Butler*, 297 U. S. 1, holds only that a statute designed to control matters reserved to the States is not saved by the extent of the problem with which Congress dealt. Petitioners' argument is an endeavor to revive the Madisonian view of the general welfare clause, which this Court rejected in the *Butler* case.

No Violation of Tenth Amendment

"There is no invasion of the reserved powers of the States. There is no coercion upon the States and their subdivisions to build public works projects, much less to build power plants in particular. Cf. *Massachusetts* v. *Mellon*, 262 U. S. 447. Nor is there any regulation of local utilities. Such regulation remains entirely with the State. The only interest of the United States is as a holder of the County's bonds, which give only the limited rights conferred on bondholders by the laws of South Carolina, relating to the sufficiency of the revenues of the project to meet interest and principal charges. There is no right to foreclose or to operate the properties even in the event of default. Unlike the Act considered in *Ashton* v. *Cameron County Water Improvement District*, 80 L. ed. 910, there is here no effort to enable the States to avoid constitutional limitations. The States are merely aided, if they so choose, to exercise reserved powers which they have consistently exercised without successful challenge in the past.

"The system of Federal grants in aid is an established form of cooperation between Federal and state governments, each exercising its delegated powers and each seeking to accomplish purposes within its legitimate sphere. Such grants have been made regularly for education, public health, highways, forest fire prevention, and other purposes.

"The declarations of the Administrator and others concerning the so-called power policy of the Public Works Administration have no relevance save as they are reflected in the proposed loan and grant, and hence add nothing to petitioners' case. In any event, the declarations are unobjectionable. They indicate that in making loans for competitive projects the Administrator left to the States and their subdivisions the question whether competition with existing utilities was desirable, and that he was concerned with the rates of a private utility only in so far as they might affect, by way of competition, the applicant's ability to earn revenues sufficient to repay a loan."

Dealing with the contention of Petitioners that the General Welfare Clause has no application to moneys borrowed on the credit of the United States, the brief states that "there is no need to discuss that contention because there is not a syllable of evidence to prove that the expenditures under the statute have been or will be made from borrowed money... In fact, it would be impossible to show whether any particular dollar of expenditure came from borrowed funds or from taxation, since the moneys in the treasury are intermingled and their source cannot be identified."

Brief for Greenwood County and Its Finance Board

A brief was also filed by Greenwood County and its Finance Board, Respondents. After setting forth that Greenwood County has full constitutional and statutory right to build and operate a hydro-electric plant at Buzzard Roost on the Saluda River, it proceeds to argue that the Duke Power Company has no standing to question the expenditure of the federal funds contemplated by the contract between Greenwood County and the Administrator of Public Works. It declares that the source from which Greenwood County secures its money is no legal concern of the Duke Power Company.

It then proceeds to argue that Congress had authority under the General Welfare Clause to enact Title II of the Recovery Act, and raises a point not dealt with by the other two briefs, viz: that the aid given by the Federal Government to Greenwood County is within the powers of the Federal Government under the Commerce Clause of the Constitution. The brief maintains that the Administrator of Public Works has acted within the scope of Title II of the Recovery Act; that Title II of the Act is not invalid as an unconstitutional delegation of legislative power; that the petitioners have failed to show that they will suffer irreparable damage by reason of the building of the plant; and that the action of the Circuit Court of Appeals in the premises was correct.

The brief for petitioners, Duke Power Company and the Southern Public Utilities Company, was signed by Newton D. Baker, R. T. Jackson, W. R. Perkins, H. J. Haynsworth, J. H. Marion, W B. McGuire, Jr., W. S. O'B. Robinson, Jr.

The brief for Harold L. Ickes, as Federal Emergency Administrator of Public Works, respondent, was signed by Homer Cummings, Attorney General; Stanley Reed, Solicitor General; James W. Morris, Assistant Attorney General; Alexander Holtzoff, John W. Scott, Special Assistants to the Attorney General; Paul A. Freund, Attorney; Edward H. Foley, Jr., Director Legal Division; Jerome N. Frank, Legal Counsel; Robert E. Sher, William J. Dempsey, Assistant Legal Counsel, Federal Emergency Administration of Public Works.

The brief in behalf of Greenwood County and its Finance Board, respondents, was signed by W. H. Nicholson, R. F. Davis, D. W. Robinson, Jr.

THE WORK OF THE AMERICAN BAR ASSOCIATION

Sacrifices in Time and Money which a Comparatively Few Lawyers Make for the Benefit of the Whole Profession—Illustrations from the Work of Committees of the American Bar Association—The Great Debt Which the Rest of the Profession Owe These Self-Sacrificing Workers—Eighty-three Percent of the Lawyers of the United States Do Not Realize or Recognize It but Accept Benefits without Payment of Any Consideration in Time, Sacrifice or Money—How Long Is This Situation to Continue?

By Frederick H. Stinchfield
President of the American Bar Association

(*A Composite of Speeches from October 6 to October 29, 1936, at Minneapolis, Kansas City, Cleveland, Raleigh, Milwaukee and Chicago.*)

SOME weeks have passed since the election of a president of the American Bar Association at Boston. Those two months have been pleasant, even if fully occupied. In that time I have learned something of the devotion of many lawyers —not enough of them—to the welfare of the profession, to the good of society, and to the American Bar Association. It has dawned on me that within our association, and in very many state and local bar associations, there are groups of men who have learned in service that "It is more blessed to give than to receive." Until I realized what these men have done, the phrase had meant to me the expression of an ideal but the full significance of which, I am quite certain, had not been fully understood. I have gained an increased respect for the work which some lawyers are doing for us and for the profession. It isn't to the presidents you elect that your gratitude should go. They are repaid in the honor you do them. But these workers, of whom you hear little and who get inadequate return in honor and respect, are the men to whom lawyers everywhere are indebted.

With the realization of the value of the work a few lawyers have done, it has been brought home very clearly to me that we are bound to give greater credit for their innumerable sacrifices for our good. I have a great desire just now to impress all lawyers everywhere with the size of the debt which the rest of us owe to the men who have devoted themselves to the work of bar associations, and more particularly, of course, to the work of the American Bar Association. That devotion and labor have been going on for a great many years. The men have had too little credit for what they have done. To be sure, they have never asked for credit. They have gone on, year after year, doing what they could for the profession and for the public, sacrificing their own time and their own business and their own selfish advancement in order that this profession may be a better thing for us and that society may be helped. We accept their labors with altogether too little appreciation. It is with reference to that subject that I wish to direct my remarks.

1,219 lawyers last year gave their time and money to the work of the American Bar Association. The same men do not work every year, although there are a good many who continue with the burdens year after year. We have over 28,000 members in the American Bar Association, but there are 175,000 lawyers in the United States. A 17% membership is not enough! Acceptance of the benefits of the work of 17% by the 83% isn't fair. About 75,000 men belong to local bar associations. I can see no reason why all of them aren't members of our association. By joining the local bar associations, they evidence appreciation of the value of such organizations. Lawyers have done better in some states than in others; but the principle remains the same, whatever the percentage, until a 100% shall have been reached. I shall have hope this year to demonstrate the absolute duty on the part of every lawyer, particularly the members of local and state bar associations, to belong to and work for the American Bar Association. That result can be accomplished if we can make every lawyer understand two things: first, that it is his duty to the profession to support an organization which works only for the profession and for the public, and, secondly, that if he doesn't join, he is accepting enormous benefits for which he pays nothing. I cannot believe that any lawyer anywhere is willing to accept benefits without the payment of a fair and reasonable consideration. It has, of course, been always clear that it is the real duty of every lawyer everywhere to do whatever he can for the betterment of his profession. But the abstract sense of duty does not yet seem to have been adequate to cause lawyers to give support to the American Bar Association to a greater extent than about 17% of all the lawyers there are. It's inexplicable.

And so I want to talk about the sacrifices in money and time which a comparatively few lawyers make for the benefit of the whole profession, to see if the emphasis upon those sacrifices won't get results which consciousness of a duty and hope in an ideal have thus far proved insufficient to accomplish.

There are very many sections and committees in the American Bar Association. The sections are of longer standing and admit to more importance. But I shall talk about a few of the committees. What they have given out of their lives and fortunes is more than duplicated in the sections. My information, however, about committee work is more exact and recent. Some time soon I hope to have detailed information as to the labors of all sections and all committees. Until then I can talk only about some of the committees. I shall hope to charge the conscience of every lawyer with the debt he owes these committee men and those

who have labored with them. The committees to which I shall refer are not unique in sacrifice, but I have the information with respect to them. Other committees and sections at other times will have my reference.

Let me speak first of the Committee on Professional Ethics and Grievances. I don't know whether this committee is more devoted to its work than are the corresponding committees of local bar associations. I can't speak for them. My interest, of course, is largely in the American Bar Association, and I want you to see the value of the work of its committees. I don't need to tell you what is the work of this committee. Shortly, it is to keep lawyers straight, or to straighten us after we are bent; to prove to those who wrongly complain, that we have been straight; and when the occasion arises, to rid the profession of those who can never be straight. We wish to keep in our ranks all who ought to be there, and to have none who should not be with us. The committee fully investigates all errors, real and imaginary, which are brought to their attention where it is clear that investigation is needed. Hearings are held when required. Evidence is produced, and always sufficient evidence to enable the committee to arrive at a fair conclusion. Formal opinions are rendered on occasion, where such opinions are desirable in the interest of justice. Sometimes it is fairer that there be no publicity. The committee confers with like committees of bar associations everywhere. It gives them the benefit, whenever it is wished, of their years and volumes of experience. Where it is difficult for local authorities to move, and easier for our committee to act, that course is followed. It is not odd perhaps that the complaints very much more often concern lawyers who are not our members, than lawyers who do belong to the association. If the complaint does concern our own lawyers, and discipline is necessary, that discipline follows. Where the complaint is about lawyers who are not members of our association, action is taken to have local associations move where something ought to be done. One of the most difficult things, and yet a very necessary procedure for our own welfare, is to satisfy those who complain, if and when their complaints are groundless. It isn't enough that we should keep our profession as honest and sincere as possible. It is necessary that those who have believed the contrary should be persuaded that their judgment has been wrong.

This committee has published a book containing all of its opinions, and has attempted to harmonize those opinions with the theoretical canons of ethics which another committee of the association has for many years been publishing. Inasmuch as it has been desired to bring idealism and practicality closer together, the Committee on Canons of Ethics has just been abolished. The work heretofore done by that committee will be continued by the Committee on Ethics and Grievances. You will find in the AMERICAN BAR ASSOCIATION JOURNAL the opinions of this committee rendered from time to time and decisions of court in various states bearing upon professional conduct.

You know what the committee does, and what I have said perhaps has been unnecessary. But you don't know what the labor has been. I believe you are going to be surprised when you know. There are seven members on the committee. There were four meetings of the committee held last year. Five of the seven were in average attendance. The estimate of time in attending these meetings is 103 days. Outside of these meetings, the secretary, the chairman, and the other members of the committee devoted 252 days to the work. The time spent in travelling to the meetings and elsewhere constituted 132 days. That total, I believe, in one year only was 487 days; almost, you will notice, 70 days apiece. I have no reason to suppose that the time spent by the members of that committee in other years was not equally as great. In fact, the secretary has told me that last year it was not necessary to have hearings outside of the regular meetings; that in many years outside hearings have been necessary, and occasionally several days have been occupied in hearing witnesses. You will also appreciate, I suppose, that in the estimate of time I have given you there is not included the service of any man or woman who has been paid for his work. No assistance by lawyers who have received money, nor work by stenographers or clerical help, has been considered. There are in my files detailed figures from the secretary of the committee showing how he has arrived at the results which I have outlined. I am willing to guess that it is seldom you have seen, anywhere, any place, so much devotion by any lawyer to the good of his profession and to the welfare of society.

Another committee of which I shall speak and of which you have heard much recently is the Coordination Committee. We are presently considering the future of the movement; but I should like to tell you a little about why there is a future and what it has cost to get where we are.

You have heard a lot about the Coordination Committee, and you know generally what was done in Boston, but you do not know what has been spent before that in labor, time and personal sacrifice. We hope to make it possible for every lawyer, anywhere, to be interested and to be effective in the work of the American Bar Association. We want to assist the local, the state, and the American Bar Associations in working for common ends. We do not wish to have conflicts of ideals anywhere in the United States amongst lawyers. We do not wish any lawyer anywhere to feel that there is any clique that runs the American Bar Association. We want to make the government of the American Bar Association representative in form, so that every lawyer will have a voice in the selection of the man who, from his community, helps in the work of the American Bar Association. We wish every lawyer in the United States to feel that he has an influence in the American Bar Association. We hope for more success in keeping our own house in order, in developing our own idealism—our own worth-whileness. We seek to improve our own stock, and we should like to have no inbreeding. We want to carry out our obligations to the profession and to the public. We want every man who needs legal service and can't pay for it, to have it. We hope that forever, everywhere, justice will be denied to no one, whether or not he can pay for the legal services involved.

It was in 1914—22 years ago—that Senator Root first suggested that the American Bar Association was not sufficiently democratic, did not have enough members, was not closely enough in touch with lawyers everywhere. The war, speculation, prosperity, the then new era, the depression and what goes along with the depression have intervened; but the idea didn't die. 15 or 16 years later it was revived. It was revived by another New Yorker—Philip Wickser. He was willing to spend years of his life to resuscitate the ideal. Seven years ago, however, he was almost alone

—a voice crying in the wilderness. Gradually he gathered unto himself disciples. They have been workers —they have accomplished. We now have the machinery; it went into effect at Boston. We are trying to make it work. Machinery won't run itself; we must have the engineers, otherwise all the labor will have been for nothing. It will require henceforth your assistance and the assistance of any and every lawyer who has ideals.

Results do not just happen. Somebody causes them to happen. And this has happened because men have been willing to work and to sacrifice for it. You will hear, from time to time, this year about its future. I know that what has been done already can furnish the means of accomplishing a great deal more, and that the accomplishments will be for the benefit of every lawyer in the United States. But what I wish to do here is to bring emphatically to your consciousness—to the consciousness of every lawyer—the fact that 83% of our lawyers have been accepting benefits without payment. Every man who doesn't belong to the Bar Association is accepting the benefits without any payment whatever, and, to a lesser degree, every man who belongs to the Bar Association and doesn't work is accepting those benefits with the payment of an inadequate consideration.

If I err in counting up the time and labor which have been spent on this proposition, I shall err on the side of conservatism. It is impossible to remember today all the things that have been done and all the men that ever worked to bring about the end that was attained in Boston.

First of all, Philip Wickser was the secretary of the committee. He revived the idea. For seven years he has spent one-fifth of his entire time on the proposal. He calls that 300 days. That is a moderate estimate, is it not, for one-fifth of seven years time? Since the movement started, there have been from time to time very, very actively engaged in the work, twenty-six men working with Mr. Wickser. He says it is modesty for them to say they have spent only 1,150 days. Please add to this the time spent by the members of the Executive Committee, the General Council, regional meetings, special and regular meetings of men everywhere interested in the proposition—not, however, merely as listeners—call it 500 days. You will have added up a total of 1,950 days. This gives absolutely no consideration to the time of lawyers paid by the association on their regular staff, nor credit for any of the time spent by the administrative staff, executive secretary of the association, and many other employees.

As for the money, the Carnegie Foundation gave us $50,000 to be spent in three years. It will have been used up this year. This was matched by the American Bar Association. That is $100,000. There are not included in this many personal expenses of the individuals I have mentioned which were often unpaid by the Bar Association. Add $25,000 or $50,000 for the foregoing amount; I don't know which is correct.

Now, you tell me how much lawyers owe the men on these committees. And when I say owe, count it in time or gratitude, as you like. What would it have cost to accomplish what they have done had there been a fund from which the money could have been paid? What burden does it put upon our sense of gratitude —any of us who have done nothing or too little for the Bar Association? How much of a burden does it put on the lawyer who has not even taken enough interest in the Bar Association to become a member? How long will lawyers accept benefits without even a sense of gratitude or without any attempt to repay?

I have tried to make you thoroughly understand that in my opinion the work of the members of all committees is quite unselfish. The hours and days of labor go unrewarded, except in the satisfaction of a job well done. The results go to all lawyers everywhere who necessarily benefit by the improvement in the law and in our professional standing. But there is one committee whose work is peculiarly unselfish, the Legal Aid Committee. It is clear that there can be no hope for payment, directly or indirectly, so far as monetary return or improvement in skill in the practice of law is involved. The men who have been working on the Legal Aid Committee conceive it to be the continuing duty of bar associations to furnish legal aid to those who have not the means to pay for it. It is their view of the duties of lawyers that never should justice be denied to any man, no matter what his status in the community; that if he has a legal right or defense, it should be available to him; that if he has not the money to pay for it, bar associations must furnish adequate skill to enable that citizen to remain free.

In 1919 this association had no committee dealing with legal aid. To help the indigent was regarded as the personal duty of every lawyer, and not an organization duty. But in 1919 Reginald Smith of Boston published a book entitled "Justice and the Poor." Its attempt was to show the constant and frequent injustice done to those who cannot afford a lawyer. That they were frequently uncared for was by many lawyers of that day regarded as a reflection upon the Bar, and they felt the information contained in Mr. Smith's book should not be given widespread publicity. Different views prevailed, however. The book was published but not under the auspices of the American Bar Association as it might have been. The preface to the book had been written by the Honorable Elihu Root. It was exceedingly well received by the American public. This kind of reception persuaded the Bar Association. In 1920 the matter came openly before the annual convention of the Bar Association. The now Chief Justice of the Supreme Court, the Honorable Charles E. Hughes, approved of the appointment of a committee to deal with the subject. Mr. Hughes was made chairman of the committee. He was unable to serve long, resigning to become Secretary of State. Reginald Smith thereafter became chairman. Quite shortly that special committee was made a standing committee of the Bar Association and has remained so ever since. Its work has been outstanding. The results are a pride to the Bar Association. It has made justice to the poor more of a reality. The purpose now of the committee is to have legal aid work the constant care of every local bar association, state, city and county. Its theory is that this sort of good will work can be better cared for in each community than from national headquarters. There can be supervision and advice, however, with respect to that work by the American Bar Association.

You will be interested in the committee's accomplishments. In 1923, only four years, you will notice, after the matter became active in our association, there was formed, on the suggestion of the committee, the National Association of Legal Aid Organizations. To it has been attracted almost every legal aid society in the country. Mr. Smith prepared its constitution. That conference now has an annual convention at

which matters concerning legal aid are discussed. It is very active and very effective. In 1924 the League of Nations discussed the matter of legal aid. The chairman of our committee represented the United States at that discussion. In 1928, at the request of the Goverment of the United States, Mr. Smith and John Bradway of Philadelphia put in book form the story and history of legal aid. Shortly after this movement was started in 1919 when statistics became available, legal aid was furnished to 96,074 people. In 1935 the number had been extended to 272,723 people, nearly three times as many. Mr. Smith, who has for seventeen years been familiar with the work of the committee, writes me that during his chairmanship the committee spent not less than 166 days each year on its labors. The appropriation they had was very small, not at all commensurate with even the expenses incurred by the committee. He believes that if we were to consider all the work done by the state and local bar associations on legal aid, all this having been made possible by the work of this committee of the American Bar Association, we should find devoted to that sort of work over 4,000 days a year. With those who are on salary considered, an inadequate and insufficient salary almost always, he believes that that amount of time could be multiplied by ten.

Here is a case where the duties of charity of each lawyer are cared for by a committee of the American Bar Association. I hesitate to say what is the obligation of every individual lawyer for the work of that committee.

Let us now consider another committee of your Association that has dealt more particularly with our own personal welfare. It is the Committee on the Unauthorized Practice of the law. In a very direct way the purpose of this committee is to retain for lawyers the jurisdiction of that kind of work which for very, very many years we have felt belongs to us. It is needless for me to tell you what the encroachments on our work have been by corporations and laymen. Wherever there has been the type of work in which monetary return seems possible, there seems in recent years to have been a constant attempt by others than lawyers to take from the lawyers the earnings they have heretofore had. How far the tendency would have extended except for this committee, it is almost impossible to say. Certainly, however, with the great activity of the committee in the last few years, the tendency to narrow the scope of a lawyer's work has ceased and we have regained, to a considerable degree, many of the fields of endeavor which had been lost to us. I believe the work which is going on all over the United States in state and local bar associations can find its origin almost entirely in the preliminary work of the committee of the American Bar Association. That committee is willing to be of assistance to any committee anywhere in the United States that is dealing with a local problem of unauthorized practice of the law. I am certain that our committee is familiar with every decision that has been written or is currently rendered anywhere in the United States. It is in daily consultation and correspondence with committees from everywhere. It suggests the form of pleading based upon precedents. It furnishes decisions. It will participate in the preparation of briefs. It advises the type of compromise which often is necessary to the advantage of both the profession and the business organizations who are encroaching. For about a year it has published a magazine known as "Unauthorized Practice News." There was a subscription of 500 early in the year. That list has now grown to 2,100. It covers everything that is going on in the courts and out of the courts in connection with unauthorized practice.

I have a memorandum from the chairman as to the work which has been done during the last year, a year typical of all other years. The figures which I give you are, therefore, by the year. Last year there were two regional meetings, one at Springfield, Missouri, and one at Atlanta, Georgia. Those regional meetings are held in order to bring into the discussion all local committees and lawyers who are interested in the subject of the unauthorized practice of the law. Ways and means are discussed and forms of action determined upon. Each of those two meetings lasted two days. There was work done both before and after the meetings. At Springfield four of the five committeemen were present. At Atlanta two of the committeemen were present. The time consumed by all the committeemen in those two meetings was 32 days. There were three other regular meetings of the committee, one at Chicago for three days, one at Washington, and several others at Boston. The committeemen consumed in meetings 16 days in Chicago, 8 days in Washington, and 18 days in Boston. You now have a total, last year, in meetings by the committee members of 74 days. In addition to that the chairman has addressed meetings in Washington, Atlantic City and New Orleans, which kept him from his office 16 days. He has conferred with local bar associations at least once a month. Call it 12 days. He has spent at Chicago headquarters, particularly in connection with his magazine, 5 days. The chairman estimates that the other committee members, for like activities, have spent a total of 48 days. Your addition is now 155 days. To that you will have to add the routine work done by the committee members at their offices and at home. I have a memorandum of the chairman for what he did in the 14 days from September 18 to October 1, inclusive. During that period there were two Sundays. There was no cessation of the work on those Sundays. The chairman says that those two weeks are typical except that "the volume of the work is somewhat less than it is during the winter and busier period." For those two weeks of routine work the chairman spent 28 hours, on a seven hour a day basis an equivalent of four days. Inasmuch as Mr. Houck, the chairman, is the kind of man to whom vacations have no interest, you can readily see that he has spent on this routine work each year 104 days. I think your addition will now show that this committee has run up a total of 259 days in one year.

Let us speak of a special committee, the one dealing with Administrative Law. You have read some of Colonel McGuire's addresses on the work of this committee. You have found him inspired. You may have been inclined to base what he has to say on the existence of inspiration alone. Let me show you that everything he says is based upon the experience, hard work, laborious efforts and research of his committee and that the conclusions that committee has come to are not mere things of the imagination.

You know how bureaus have grown. I do not know how many thousands or hundred thousands of men in governments and states are now running bureaus. It has seemed to some that by the growth of bureaucracy our liberties are threatened—threatened

by the theories involved and by the practice under the theories. Some say that judicial processes and bureaus are antagonistic terms—that the separation of powers into legislative, executive and judicial is little known to administrative law. Many people object when the same men search for sins, indict for them, present the evidence of them, and then render judgment on the discovery, prosecution, and proof of sins.

That is the subject on which the committee has been working. What has it done? Well, it has examined every source of information, practical and theoretical, to gain wisdom. It has held meetings of its own members and of and with other people. It has written articles for magazines, lay and technical. It has made speeches. It has drafted bills for Congress. It has been constantly consulted by federal officials and congressional committees. It has written several extraordinary reports—treatises perhaps they should be called. Now let me tell you what work all that involved.

Every year there have been three meetings in Washington, generally for two days. Four out of the five committee members attended. Two of these men didn't live in Washington. They had to use time to go and come. The committee met every day when the convention was at Boston. The only reason all five members weren't present was because one man was ill. What I have just outlined to you makes a total of 40 days. In research the chairman has spent 37 days more; and Mr. Caldwell, another member of this committee, has spent another 30 days. You will find the total to be 107 days. Mr. Caldwell carried on a salary paid by his office a young man who spent six months on the same work. The committee has obtained assistance from professors of two or three different law schools, and the professors in turn have received assistance from the graduate students working at the law schools. No one can estimate the great number of days that went into the work from those sources.

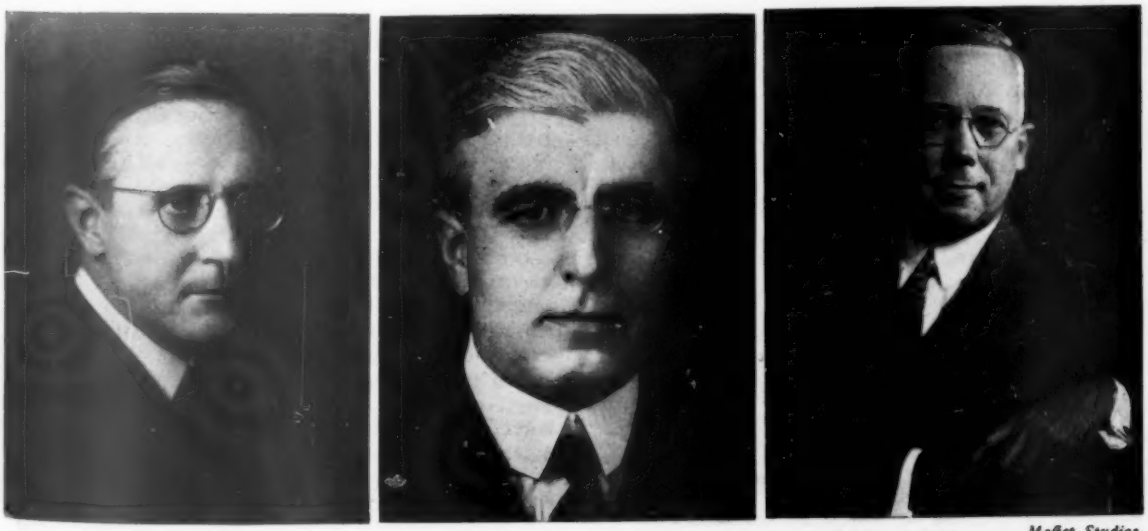
We have some indication of what this work might ordinarily cost in dollars by what has heretofore happened. In 1911-12 when bureaus were in their infancy, Congress, at the request of President Taft, employed five experts to study the matter and $100,000 was appropriated to take care of that work. Under President Harding further work was done and another $50,000 was appropriated. At the present time, the administration has a commission working on the matter, and there is a Senate committee. I do not know what the cost of that will be.

While the same subject was being studied by these commissions to which I have referred, the approach was somewhat different from that used by our committee. The study made by the governmental commissions was, of course, in order to coordinate the law, to eliminate duplication, and to make the machinery run better. The work of this committee is what a lawyer would expect—to see that the bureaus not only work effectively and efficiently, but to see that the things they do have that judicial air and procedure which from time immemorial have meant the accomplishment of the ends of justice.

Again let me emphasize that reference has been made to a few committees only because similar information as to other committees and to sections hasn't been available and because limitations of time do not permit enlargement.

And let me also emphasize once more, as we close, that 83% of the lawyers of the United States have heretofore accepted these benefits to their profession without the payment of any consideration, in time, sacrifice or money; that of the 17% of the lawyers who have joined with us, only about 5% did the work last year, and 5% of the 17% is less than one per cent of the lawyers of the United States. Is that lack of interest and of gratitude to continue?

When you hear, at any time this year, committee members of the American Bar Association talking about what their hopes are, remember that in all they say they speak from entire devotion to the causes they serve, and of a sincere idealism, all offered on the altar of the American lawyer.



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Section Chairmen, 1936-37: Left, Charles I. Francis, Chairman of the Mineral Law Section. Center, Carl V. Weygandt, Chairman of Judicial Section. Right, Elmer A. Smith, Chairman of Public Utility Law Section.

COMMENT ON CURRENT PROBLEMS OF THE LAW OF COMMUNICATIONS

Let Us Not Be Too Quick to Assume That Legal Problems of Radio Are Really New or Require an Abrupt Break with the Past—Constitutional Guarantees and the Radio—Remarkable Decisions in State Courts on Actions for Defamation—An Unheralded Phenomenon—Method of Radio Regulation in This Country, etc.*

By Louis G. Caldwell*

Member of the Washington, D. C., Bar

THE prospect of taking part in the discussion of any subject having to do with the law of electrical communications would lure me away from any meeting that might be in progress elsewhere in the halls of this Convention. Of course, I would make an exception if the committee of which I am a member, the Special Committee on Administrative Law, were in session but, on second thought, I would not call this an exception. Primarily, the problems to which the Standing Committee on Communications addresses itself, and which it has so ably presented in the report under discussion, are problems in a field, a vitally important field, of administrative law. At least, this is true of the domestic aspects of federal regulation of communications and, in the last analysis, I think it is true of the international aspects.

The Committee on Communications is to be congratulated on its accurate appraisal of the character and importance of the legal problems that demand study in the field of electrical communications, and on its determination to come to grips with those problems. With its program of research and correlation of activities, I heartily agree, and I hope the program will receive the unstinted support of the Association.[1]

With every desire to be of help in furthering this program, I propose to venture a few suggestions as to vantage points from which the general approach to radio-legal problems might well be made. Let me warn you in advance that some of these suggestions may have the empty ring of mere platitudes.

The fact is, however, that they reflect views which I have not always held and which you will not find as frequently expressed as are diametrically opposing views. In my own case, they have been evolved over a period of several years by a sort of mental trial-and-error process, in observing and commenting on developments in radio regulation. Indeed, you will find some of them contradicted in the over-voluminous writings in the field of radio law which I put forth several years ago (including certain *obiter dicta* in the early reports of this committee which I should dearly love to retract without prejudice). If they have any merit, perhaps it is that they *are* platitudes and represent a longing for safe, familiar soil after an unsatisfactory odyssey in uncharted seas.

My first suggestion is this: Let us not be too quick to assume that the legal problems of radio are really new or that they require an abrupt break with the past. I wish that time permitted me to develop this more fully than I shall, but perhaps I can, in broad outline and with an illustration or two, give point to the suggestion.

At the outset we must distinguish clearly between two kinds of regulation, which, unfortunately, are all too frequently confused one with the other. One kind has to do with the technical side of radio. It is essentially *traffic regulation* and is directed at achieving a maximum use of the ether, mainly through the prevention of interference. The other kind has to do with the *contents of communications* that are transmitted by radio, broadcast programs, for example.

Everyone concedes that the traffic regulation, the prevention of interference, is necessary. When the interference is across international boundaries, there must be international regulation by treaty. When the interference is domestic in scope, there must be domestic regulation in the form of laws enacted by Congress and regulations promulgated by an administrative agency such as the Federal Communications Commission. I shall not pause to discuss whether we have chosen the ideal machinery to accomplish this, either nationally or internationally. For present purposes, it is sufficient to recognize the necessity of some sort of traffic regulation. If time permitted, I believe I could demonstrate to you that, while the problems revolve in part about novel scientific facts and principles, there is no want of helpful analogy in the problems of other businesses which have been with us for years, and that the traffic regulation of radio entails no radical departure from the precepts and concepts of yesterday.

The other kind of regulation, having to do with the contents of communications, desperately calls for clear thinking. What is radio? Stripped of its formidable terminology and its electrical mysteries, it is an agency of communication between human

*Address delivered before an open forum conducted by the Standing Committee on Communications of the American Bar Association at Boston on August 25, 1936. Mr. Caldwell is a member of the Illinois and District of Columbia Bars. He was chairman of the Standing Committee on Radio Law, and its successor, the Standing Committee on Communications from 1928 to 1933. From 1933 to 1935 he was chairman of the Association's Special Committee on Administrative Law and is now a member of that committee.

1. The program referred to appears in the report of the Standing Committee on Communications submitted to the American Bar Association at its 59th Annual Meeting held in Boston, Aug. 24-28, 1936.

minds, nothing more, nothing less. There are, of course, other uses to which radio waves are put, such as the curing of diseases and the transmission of energy, but such uses need not detain us. As an agency of mass communication, called broadcasting, radio is the youngest member of a family which includes the public platform, the newspaper and the moving picture. As an agency of person-to-person communication, it is the infant in a family to which the letter, the semaphore, the telegram and the telephone conversation all belong.

In order not unduly to complicate the matter, I shall talk of radio solely in terms of mass communication, namely, broadcasting. I realize that this is not altogether fair to the important field of person-to-person communications but time will not permit me to do otherwise.

Broadcasting is like the public platform, in that the communication is instantaneous; it is different in that it reaches many more people, it reaches them in their homes, and pending the advent of television, the speaker is invisible to the listener. It is like the press in the number of people reached and in the fact that they are reached in their homes; it is different in that it is instantaneous and (pending the advent of television) addresses their minds through the ear rather than through the eye.

Do these differences justify new rules of law and a different system of regulation? Do they create new dangers which demand that we destroy the safeguards built up by civilization against old dangers? I am not going to venture categorical answers to these questions. I do urge that a "Stop, Look and Listen" attitude be adopted before rushing into affirmative answers.

I suppose there is no more important problem in the fabric of our civilization than whether and to what extent we shall control the avenues of communication between human minds. The dawn of civilization came with the development of spoken language, which, after a lowly origin in the frog pond, lifted man above the animal kingdom, and became his most important socializing instrument, the *sine qua non* of thought itself. Aeons later, but before recorded history, came the invention of written language. As a gifted modern writer has said:

> "If language be the tie that binds human society, *written* language is the bridge between the present and the past and hangs the future on the present. . . . In the history of civilization which became part of our cultural heritage, the invention of writing must certainly be rated as the most decisive single step."[2]

Since then, the principal aim of human civilization in its intercommunication processes, and the principal evidences of its success, have been the successive triumphs over barriers of space and time in transmitting the voice and the written word over the seven seas and down through the ages.

The conquest of the barrier of time has proceeded, at first slowly but at an accelerating pace, from the artistic drawings of the reindeer man in the cave of Altamira, the first crude picture-writings, the alphabet devised by Phoenician traders and the development of phonetic writing, the papyri of the Egyptians and the parchment rolls of the Romans, the invention of printing, and the devising of photography, until it now embraces not only storing up the accumulated learning of the past and the present in books, magazines and newspapers but also preservation of the voice in the electrically-transcribed phonograph record and preservation of voice, appearance and action in the talking-moving picture.

The conquest of the barrier of space, at first limited to the range of the eye and the ear, later aided by artificial devices such as the megaphone, the field glass, and the relay of conventional signals from watchtower to watchtower, was, until the harnessing of electricity, largely dependent on means of transportation. That the horse and buggy days lasted until the building of railroads is a truism; as late as the eighteenth century as much time was required to dispatch a letter from London to Rome as in the days of the Caesars. Now, the airplane serves to transport the letter, the newspaper, the electrical transcription and the news-reel, at a speed that for many practical purposes is as satisfactory as if it were instantaneous. In its turn, electricity has almost completely annihilated space. Thinking still solely in terms of mass-communication, we need only recall that the telegraph wire, the cable, and the telephone wire have been built into a vast network covering the globe, over which facts and ideas gathered by an army of newspapers from its four corners are laid before you at the breakfast table in printed form, or, in more recent years, are addressed to your ears at frequent intervals throughout the day by hundreds of broadcasting stations, or are brought to you, if you require it, by an instantaneous ticker that prints before your eyes. To this wire network has been added the ether as a medium for the simultaneous navigation of countless electrical vehicles carrying messages, written, spoken and visual. With the promised perfection of facsimile and television, by wire and by radio, taking their place in this vast but delicate world-wide nerve-system for dissemination and preservation of intelligence, it would seem that little of time or space remains to be subjugated.

The earlier steps forward in the history of communications were separated by thousands of years; the later steps have succeeded one another with an increasing and disconcerting rapidity, particularly since electricity was put at the service of mankind. Miraculous and spectacular, however, as are the achievements of that branch of electrophysics known as radio, I dare say that, when some future H. G. Wells undertakes to rank the steps in their relative importance, he will give broadcasting a rank no higher and more likely lower than that of the principal earlier events. In any event, he will recognize it for what it is, a very important member, but still only a member, of the family of agencies of communication between human minds, bound and related to the others in a seamless web of which the warp is time and the woof is space.

All this, you may say, is perfectly obvious. Perhaps, but those in charge of the destinies of radio in most foreign countries have not thought so, and to a remarkable extent our Congress, our courts, and our regulatory agencies have not thought so. Even in those European countries such as England, France and the Scandinavian countries, which have retained a democratic form of government, which preserve the tradition of a free press and which would not think of having

2. Dorsey, *The Story of Civilization*, p. 57.

their governments undertake ownership or control of either the press or the public platform, broadcasting is, in whole or in part, directly or indirectly, in governmental hands. Consciously or unconsciously, they have accepted radio as something new, calling for radically different rules from those that had been imposed upon its ancestors among the agencies of mass-communication.

What has happened to radio in this country? We can get some idea by scanning the first ten Amendments to the Constitution of the United States and by noticing to what extent the man who has his livelihood and his fortune tied up in the business of broadcasting has been denied the protection of constitutional guaranties which men in other businesses enjoy.

Take first the freedom of speech guaranteed by the First Amendment. Under the interpretation placed on its power by the Federal Radio Commission and its successor, the Federal Communications Commission, and under decisions so far handed down by the courts, a broadcaster may be deprived of his license, the use of his property, and his source of livelihood for causing or permitting utterances to be made over his station which, if they were printed in a newspaper, would be held to be within the protection of the guarantee of a free press in that same Amendment.[3] This is done by refusing to renew the broadcaster's license at its expiration, and is done notwithstanding a section in the federal statute which expressly forbids the Commission to exercise any power of censorship or to promulgate, or fix, any regulation or condition, which interferes with the right of free speech. It is true that this power has not, in actual practice, been carried very far, nor has it been exercised except in extreme cases, but its existence has been recognized and upheld by the courts, and it is at hand for misuse and abuse.

Take next the due process clause in the Fifth Amendment. Under the express language of the statute[4] and under decisions of the Supreme Court, the man engaged in broadcasting has no property right in the continued use of his property for the only purpose for which it is suited, although with respect to nearly all other businesses this right of use is held to be a property right protected by the clause. Of course, I realize this is true to some extent of all businesses which are held to be affected with a public interest—in fact, I submit that since the Supreme Court's definition of businesses affected with a public interest is already somewhat circular, we might as well complete the circle and define them as those businesses that have been deprived of the benefit of the protection of the due process clauses in the Fifth and Fourteenth Amendments. With respect to few if any of them, however, is the nullification carried so far as it is with respect to the licensees of radio stations. Upon only a meagre showing, the broadcaster's business may be taken from him and given to some one else, or may be taken for public use without compensation. The broadcaster does not have the benefit of other actual or potential aspects of the due process clause which I shall pass over with bare mention: the right to a reasonably definite standard to govern his conduct instead of the vague and unpredictable norm "public interest, convenience or necessity"; the right of recourse to constitutional courts for final determination of his rights and duties (except on question of law); and the right to a judge who is not at the same time legislator and prosecutor.

How about compelling a man to be a witness against himself? Under the Federal Communications Act, violation of any of its provisions is a crime punishable by imprisonment and heavy fine, and violation of any of the Commission's regulations is a crime punishable by fine. Any of these violations is ground for the Commission's revoking a license, or for refusing to renew a license. If you look to substance and not merely to form these are heavier punishments than fines. Yet, the Commission has a regulation which requires that a broadcaster, on being notified that a violation has been reported against him, submit an affidavit setting forth the actual facts within three days. Failure to comply with this regulation is in itself a violation for which he may be deprived of his license.

The broadcaster does not enjoy the protection of jury trial under the Sixth and Seventh Amendments with respect to controversies involving the issues most important to him, whether it be a proceeding to deprive him of his license for violation of a regulation, and therefore in reality a criminal prosecution, or a civil proceeding in which someone else is trying to take his business by obtaining the rights conferred by his license. The broadcaster is also deprived in substantial measure of the substance of the protection conferred by the Fourth Amendment against unreasonable seizures.

As a matter of interest, although without any direct bearing on my thesis, I also call your attention to what can really be accomplished by the Federal Government in invading the domain of the powers reserved to the States under the Tenth Amendment, if the Government will content itself to making progress slowly and not attempt to take over the whole domain by sudden legislative or executive fiat. Until recently radio communication of all kinds has, with only minor exceptions, been carried on by use of radio waves that have a very considerable range with respect both to service and to interference. A federal district court decision rendered in 1927 declared:

"Radio communications are all interstate."[5]

This was undoubtedly true at the time of the decision. Now, however, science is gradually opening up for practical use a vast new range of radio waves, usually referred to as the ultra-short waves (the ultra-high frequencies). As the waves become shorter, their service and interference range tends to become smaller and, in fact, to become like the performance of light waves, limited by the horizon. A plausible case could be made out for the contention that, beyond a certain point, these ultra-short waves are a matter of intra-state regulation under the powers reserved to the States. Yet pioneers in the use of these waves are planting the flag of fed-

3. I have developed this thought at some length in an article entitled *Freedom of Speech and Radio Broadcasting*, Vol. 177 of the *Annals of the American Academy of Political and Social Science*, p. 179.

4. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266; *General Electric Co. v. Federal Radio Commission*, 31 F (2d) 630 (281 U. S. 464); *United States v. American Bond & Mortgage Co.*, 31 F (2d) 448, 282 U. S. 374, 52 F (2d) 318; *White v. Johnson*, 29 F (2d) 113, 282 U. S. 367, and other cases.

5. *Whitehurst v. Grimes*, 21 F(2d) 787.

eral regulation on the newly-won portions of the radio spectrum, so far without objection from anyone. There are, it is true, possibilities of an eventual clash between persons using these waves for communication purposes under federal licenses and persons using them for therapeutical purposes in the service of medicine, or for other purposes not related to the transmission of intelligence and not related to interstate commerce. I venture to predict, however, that the system of federal regulation will have become so thoroughly established that the courts will find adequate and convincing reasons for upholding its title to the new territory, as against squatters claiming under States' Rights. The importance of this will be readily apparent when it is understood that, according to all present portents, television by radio, if and when it comes, will use these ultra-short waves. The course of radio regulation in this country may, conceivably, take a strange and unforeseeable turn if television should prove to be a matter for state and not federal regulation.

Returning to my thesis and indulging somewhat, but not altogether, in facetious exaggeration, I may say, by way of summary, that about all that is left of the first Ten Amendments, so far as the broadcaster is concerned, is his right to keep and bear arms and not to have soldiers quartered in his studios in time of peace. When I hear criticisms of the Supreme Court to the effect that the Court has allowed rigid and outworn interpretations of the Constitution to block the way to the necessities of modern governmental regulation, I wonder if the authors of such criticisms have really been reading the Court's decisions in recent years. For more than a half-century the advent of any new business made possible by the progress of science has rarely failed to bring in its trail legislation more drastic than had been thought constitutionally permissible against the older, established businesses that were known to the members of the Constitutional Convention, and this legislation has, more often than not, been upheld in the courts.

Mind you, I am not urging upon you that this constant ebb in the significance and scope of the first Ten Amendments is unsound or undesirable, although I confess that I regret some aspects of it. I particularly deplore the danger to freedom of speech which, it seems to me, results from holding that our greatest agency for mass communication of speech, the modern successor of the public platform and the stump-box, is not entitled to the full protection of the First Amendment. I do urge upon you a realization that, rightly or wrongly, this idea that radio requires us to adopt new rules and to dump ancient rights overboard has already been carried very far. Do not, for example, accept too readily the conclusion that, because radio waves ignore international boundaries, we should encourage additional governmental regulation of what is said over stations in Country A so as to prevent the broadcasting of something that might fall unpleasantly on the ears of the government or of some citizen of Country B. And I suggest that before plunging further into the unknown we might well examine, in realistic fashion, what have been the actual advantages and disadvantages accruing from the plunges we have already taken. What, for example, has really been the result of radio's loss of property rights under the Fifth Amendment? Has some sound public interest been served and, if so, what is it? Or has the result been harmful to the listening public, or unjust to the little broadcaster who has seen the solid foundation of constitutional protection crumble beneath him? Is it true that, having cut loose from an ancient mooring, we are now, in stumbling and groping fashion, making every effort to tie up with its security and its benefits under other names?

These same thoughts might well be carried down from the plane of constitutional law to the plane of statutory law and common law. In recent years, radio has been subjected to remarkable decisions in state courts on actions for defamation.[6] It has had to bear a hitherto undreamed of degree of responsibility under the federal copyright statute.[7] Examples might easily be multiplied,[8] but I must proceed to my second suggestion.

It is this: Do not confuse the problems of radio with problems due to current pressure for changes in political, economic and social philosophy. The latter can not and should not be ignored but, whatever be your school of thought, do not allow it to destroy your perspective. As I read the books which pile high on the bookstands these days, in which the authors glibly read an economic interpretation into the Constitution to the exclusion of all else, and ascribe to its framers every sort of selfish economic motive, I am puzzled. It has not seemed to me that the Constitution rests on any particular economic philosophy. If it does, that philosophy is not apparent on its face, or in the debates of the Convention, or in the contemporary writings of those who are commonly regarded as the oracles of its interpretation.

The trouble, if there is any, seems to me to lie in the fact that any government, whatever its philosophy, tends to become static and to resist precipitous change. Our Constitution does stand somewhat in the way of change other than by orderly processes which afford opportunity for fair consideration of the rights both of the public and the individual. We are now in a period in which there is great pressure for rapid change. Such pressure has always been accompanied by impatience with the orderly and formal processes prescribed by law for effecting changes. There is a

6. See, for example, *Sorenson v. KFAB Broadcasting Co.*, 243 N. W. 82; *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847; *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889; *Meldrum v. Australian Broadcasting Co., Ltd.*, 18 Victorian Law Reports 425. See Vold, *Defamation by Radio*, 2 Jour. Radio Law 673; *The Basis for Liability for Defamation by Radio*, XIX Minn. L. Rev. 611; Farnum, *Radio Defamation and the American Law Institute*, XVI Boston U. L. Rev. 1.

7. *Buck v. Jewell-La Salle Realty Co.*, 283 U. S. 191; I have attempted to outline the present state of the law in an article, *The Copyright Problems of Broadcasters*, 2 Jour. Radio Law 287.

8. Among the examples may be mentioned the general subject of piracy of non-copyrightable material, e. g., news and broadcast programs. See *Associated Press v. KVOS, Inc.*, 80 F (2d) 575, reversing 9 F. Supp. 279. I have attempted a general discussion of some of the problems in two articles, *Piracy of Broadcast Programs*, 30 Col. L. Rev. 1187 and *International Protection of Broadcasters against Commercial Uses of Their Programs*, 2 Jour. Radio Law 479. The tendency to enlarge the meaning of the lottery section of the Communications Act of 1934 is shown in Haley, *The Broadcasting and Postal Lottery Statutes*, IV Geo. Washington Law Rev. 475. A number of other examples and citations might easily be mentioned but the foregoing are sufficient to illustrate this point.

regrettable tendency to confuse these processes with the philosophy of government sought to be changed. It may be that the world is developing into an era of some radically new political philosophy. Or it may simply be undergoing some minor adjustments, which, like the cooling of the earth's crust, cause a slight tremor here and a violent earthquake there, but on the whole leave the world pretty much as before. In any event, it is not at all impossible that there are certain liberties and safeguards that are valid and should be preserved to the subject under any form or theory of government.

This is not the first period in recorded history that has suffered pressure for rapid change. England, and Europe generally, had a similar experience in the sixteenth and seventeenth centuries. The tendency everywhere was to concentrate power in the executive so as to facilitate the rapid and efficient making of adjustments. And it was just at this time that the press was born. As a result, it was born to a license system, which persevered under the Tudors and the Stuarts in England. The statutes of Parliament and the ordinances of the Star Chamber were strikingly like the radio title of the Communications Act of 1934 as it has been interpreted; they regulated the manner of printing, the number of presses throughout the kingdom, and prohibited all printing against the force and meaning of any of the laws of the realm. At the time this began, it was generally regarded by good citizens as necessary and was accepted with complacency, but I need not tell you what heroic effort was necessary a few years later to throw off the shackles. Broadcasting was likewise born in an era of great pressure for change, reflected in the many commissions and other administrative agencies established during the last half century. It was born to a license system extending not merely to its technical regulation but even to regulation of what may be said before the microphone. Are we now passing through another cycle and repeating the history of sixteenth-century England? Only time will tell.

It will not be amiss at this point to invite your attention to a phenomenon which is developing almost unheralded in both the international and the domestic regulation of radio. I am sure that it is not peculiar to radio but it is a significant omen for the future. To some extent we already are at the cross-roads with a mild expression of a new theory of representative government in our method of regulation, namely, that representation should be on the basis of economic interests and not of territorial subdivisions of the earth's surface. This is particularly apparent in international regulation, as it is brought about at a general international conference such as the one held in Madrid in 1932, and such as will be held at Cairo in 1938. In appearance, the important issues are between countries and it is by countries that votes are taken. In fact, and beneath the surface, the real issues are between businesses (including government departments) and spread horizontally through all the countries. For example, the most important issue at these conferences is, as a rule, the manner in which the radio spectrum, consisting of the whole range of radio waves from the longest waves (the lowest frequencies) to the shortest waves (the highest frequencies), shall be split up into bands and assigned to different services or uses. In this controversy, broadcasters everywhere lock horns with the merchant marine, aviation, commercial toll services by radiotelegraph and radiotelephone, amateurs, and the military and naval establishments of the various countries. The representatives of all these interests are present at these conferences and are actively at work, seeking to get their objectives accomplished through the delegates of this country or that. When the issue comes to a vote, the vote of any particular country will depend on which of these various interests is on top in that country. In Central European countries which boast no navies and no merchant marine, broadcasting rules; in England and other maritime countries, the mercantile marine usually has its way; in the United States, because of our peculiar set-up, the controlling voice has usually been that of the Navy and other government departments who are not subject to the Commission. These same issues are frequently mirrored in miniature form in the domestic regulation of radio. This phenomenon and its implications well deserve study.

One more suggestion and I am through. It is this: Keep in mind that the method of regulation which we have adopted in this country is not peculiar to radio. This method is a license system, administered by an administrative agency. According to a calculation which was made by the Special Committee on Administrative Law, there are (as of January 1, 1935) 149 instances in the federal statutes where a license, permit, certificate or other formal authorization is made a prerequisite for carrying on a business or engaging in an activity, or the doing of an act. In approximately 54 of the 149, power is given to the administrative agency to revoke or suspend the license or other authorization for violation of the statute or of regulations promulgated by the agency, and in many, perhaps most, of the others the power is implied and in any event claimed and exercised. In fairness, I should mention that there is one difference in the practice followed by the Federal Communications Commission and that followed by all or most of the other agencies. The Federal Communications Act is the only statute which has come to my attention under which proceedings on applications for renewal of license are employed to put licensees out of business instead of revocation procedure. There may be others. The Communications Act does provide for revocation but the Commission has not made use of the provision since there are obvious advantages to the Government in the present practice. While this difference is exceedingly important and well deserves separate study, I do not believe it affects the fundamental similarity of the problems raised by the license system wherever it appears.

Some of the 149 instances of the license system are trivial and relatively unimportant. Others are exceedingly important, including the licensing of securities exchanges, second-class mail privileges, licenses issued by the Federal Power Commission and many others. Remember also how close we came to placing all the industries and trades of the country under a license system in the National

(*Continued on page* 878)

SAILING CLOSE TO THE WIND, OR THE NEED FOR A FEDERAL ADMINISTRATIVE COURT

Constitutional Background of the Problem—Changing Conditions Which Have Made It Increasingly Acute—Bewildering Fashion in Which Administrative Agencies Have Been Piled on Top of One Another—The Realities Must Be Faced and Provision Made at Once to Take Some of the Load from the Administrative Branch of the Government and Thus Restore Due Equilibrium in Governmental Power—Proposal of Committee for Administrative Court Twice Approved by Association*

By Col O. R. McGuire
Chairman of the Committee on Administrative Law

POLYBIUS, the Greek historian, writing about 150 years before the beginning of the Christian Era, concluded from his survey of governmental organizations that there existed a cycle of government which included six different forms and these he classified as kingship, aristocracy, democracy, despotism, oligarchy and mob-rule. He said that despotism arose "without artificial aid and in the natural order of events. Next to this, and produced from it by the aid of art and adjustments comes kingship; which degenerating into the evil form allied to it, by which I mean tyranny, both are once more destroyed and aristocracy produced. Again the latter being in the course of nature perverted to oligarchy, and the people passionate avenging the unjust acts of their rulers, democracy comes into existence; which again by its violence becomes sheer mob-rule."[1] We have but to look about us at events in Europe and Asia during the past twenty-five years to realize that the policy of drift has proven the cycle to be in operation as truly today as almost eighteen hundred years ago when the words were written.

Polybius further said that Lycurgus, the immortal law-giver:

". . . was fully aware that all of these changes which I have enumerated come about by an undeviating law of nature; and reflected that every form of government that was unmixed, and rested on one species of power was unstable; because it was swiftly perverted into that particular form of evil peculiar to it and inherent in its nature. For just as rust is the natural dissolvent of iron, wood-worms and grubs of timber, by which they are destroyed without any external injury, but by that which is engendered in themselves; so in each constitution there is naturally engendered a particular vice inseparable from it: in kingship it is absolutism; in aristocracy it is oligarchy; in democracy lawless ferocity and violence; and to these vicious states all these forms of government are, as I have lately shown, inevitably transformed. Lycurgus, I say, saw all this, and accordingly combined together the excellencies and distinctive features of the best constitutions, that no part become predominant, and be perverted by its kindred vice; and that each power, being checked by the others, no part should turn the scale or decisively outbalance the others; but that, by being accurately adjusted and in exact equilibrium, the whole might long remain steady like *a ship sailing close to the wind.*"[2]

No man who has made a careful study of the debates in the Constitutional Convention of 1787, the debates in the ratifying State conventions, and those masterful papers written by Hamilton, Madison, and Jay in an attempt to persuade the necessary ratification of the Constitution can fail to be convinced that the men who participated in winding up and starting our machinery of government were acutely aware of the cycle of all governments as outlined by Polybius in that long ago. Our forefathers in the Constitutional Convention attempted, as did Lycurgus, to check each principal governmental power by the other principal governmental powers and to check each national group by other such groups so that none of them should turn the scale or decisively outbalance the others. They did not possess the gift of prevision but they did know the past and they so tried to state the checks and balances in terms of basic principles that those who were to come after them—without necessity of change in basic principles—should have both the duty and responsibility of readjusting the mechanism from time to time if they would avoid undue weight being thrown upon one scale or the other. I need not add to such a learned audience as this one that the constitution of Lycurgus, for all his care, and that of the Roman Republic, which was modeled thereon, have long since ceased to exist but I may posit the question whether we shall follow a similar policy of drift in making the necessary readjustments until it will be too late for a modern Diocletian to succeed where the Roman one failed. The tragedy in human history is that the people heretofore have failed to readjust their governments until it has been too late.

With reserved authority in the people, subject to checks and balances, to defeat at the polls any Chief Executive and all members of the Congress who fail in the exercise of their governmental powers and with similar authority in the people to amend the Constitution to meet changing conditions, the framers of the Constitution balanced in general terms against the principal Executive power both the principal legislative and judicial powers. They balanced in general terms against the principal legislative powers the principal executive and judicial powers. And they balanced in general terms against the principal judicial powers both the

*Address delivered before a Joint Meeting of the Missouri Bar Association and a Regional Meeting of the American Bar Association at Kansas City, Mo., Oct. 10, 1936.

1. The Histories of Polybius, Shuckburgh's translation, Vol. 1, p. 460.

2. Ibid, p. 466. Compare the Federalist No. 38.

principal Legislative and Executive powers. I use the term "principal" advisedly because it was recognized in even those simple days that it was not practicable to prevent any one of the three branches of the Federal government from exercising some of the powers of the other two branches. James Madison, who has been rightly termed the "Father of the Constitution," said:

"Experience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which proves the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."[3]

I shall not attempt at this time to enter into any discussion with respect to whether so many checks and balances have been provided that the Federal government is impotent to meet emergencies without a temporary enhancement of the executive branch of the Government at the expense of the other two—but I call your attention to the fact that the failure of the plan devised in the Constitution for the election of our Chief Executive and the change in the original plan for the election of members of the Senate have resulted to some extent in disturbing the equilibrium which was thought to have been devised. Whether this was for good or ill I do not presently consider. Later on in this address I shall refer to the gradual development of the existing situation which has resulted from the impossibility, as recognized by Madison, of a rigid segregation of governmental powers into separate branches of the Federal government, and show how during the past century the balance of power has been overweighed in the executive branch of that government.

Before taking up the Executive power in relation to the other two powers of the Federal government and in relation to the rights of the citizen—and as further background for this discussion—I remind you that when our Constitution was adopted and for many years thereafter we were firm believers in the doctrine of *laissez faire*, unquestionably a people believing in individualism both in economics and politics. The headlines of our daily newspapers are sufficient to remind us that this belief is today held by a considerable number of people. Also, in the early days, the individuals functioned as such in their relation to the government but they had commenced to form voluntary associations even before Washington had ceased to be President and we find him issuing a solemn warning to the people of the dangers inherent in political factionalism.[4] The associations developed in the early days were principally political or religious in character but, commencing shortly after the Civil War and with the gradual disappearance of our frontiers, there have been organized many other associations to further the economic and social aspirations of great groups of our people. The gradual integration of forces outside of the government for economic, social and ethical purposes resulting from the pressure of population, the growing complexity of industrialism, the realization of the power and force of the ballot wielded by groups to attain ends and objects impossible of attainment by individuals acting as such, and the growing weight of opinions of such groups, made articulate and concentrated on executive and legislative officials through the telegraph, the telephone, the radio, and the popular press have resulted in conditions of government faced by administrative and legislative officials beyond the wildest dreams of the men of 1787. These integrations of social and economic groups are resulting in a stratification of national society with results which we can not now fortell but we know we are in a period of change—and looking across the seas we observe two such groups linked in a death grip.

Now with this brief introduction in general terms with reference to the lessons of history, the basic principles with which we must deal, and the changing conditions, I come to a closer consideration of the need for an administrative court if we are to tack the sails of the Ship of State and make her sail close to the wind.

After discussing and discarding suggestions for an Executive Council, a Council of Revision, and various other devices designed to distribute the executive power, the Constitutional Convention finally agreed that but one elective official, the President of the United States, should exercise the Executive power which was vested in him without qualification. In the third section of Article 2 there was vested in him certain enumerated powers along with one that "he shall take care that the laws be faithfully executed." The Supreme Court of the United States has held in the Myers case[5] that in order for the President to carry out these constitutional mandates, he must have an uncontrolled discretion in the removal of any officers engaged as his subordinates in the performance of executive duties. That court later held in the Humphreys case[6] that such power was unnecessary in the President where the officer was not in the performance of executive duties and that while Congress could not restrict his power of removal of executive officers, it could restrict that power in the removal of non-executive officers.

The Executive Power is a vast power of government. The members of the Constitutional Convention had before them the record of excessive Executive power being exercised by one individual and, in fact we had just completed a seven years' war with England in order to escape from such executive tyranny after we had indicted King George at the bar of history in the noble words of the Declaration of Independence. However, they likewise had before them the impotence of the Roman triumvirate, their failure to maintain the Roman Republic, and the rise of the Roman Empire on the ruins thereof which finally disintegrated and fell before the venality of both the emperors and the people together with the hammering of the Gauls at the gates of Rome. Also, the men of 1787 had experienced an attempt to conduct a government under the Articles of Confederation without any Chief Executive and had seen the fruits of victory almost lost in the "critical period." Well might Franklin, at the close of the Convention labors take the floor, point to the sun painted on the back of the chair occupied by the president of the Convention, and say that during their struggles he had often looked at that sun and wondered whether the American people were facing a rising or a setting sun and that he then knew they were facing a rising sun.

3. Federalist No. 37, Lodge Edition.
4. Farewell Address.
5. *Myers* v. *United States*, 272 U. S. 52.
6. *Humphrey* v. *United States*, 295 U. S. 602.

While the Constitution was one of compromises, there were few of more importance to us of today than the failure to make any provision whatever for the exercise of administrative powers of government; this came about because executive powers were apparently believed to include administrative powers and it was intended that the Chief Executive should be some sort of a political chief in the exercise of the duty laid upon him to "take care that the laws be faithfully executed." There is no suggestion in the recorded proceedings of the Convention that it was intended to make him the supervisor of a great administrative establishment. It will be remembered that under the Articles of Confederation Congress not only established the various boards and commissions which functioned with administrative powers but Congress in many instances manned them by its members. Whatever may have been the reason for the failure to provide for any administrative machinery for carrying out the details of the law or for exercising that combination of executive, legislative, and judicial power, which Madison admitted in the Federalist papers was necessary to some extent in practice, the fact is that the Constitution makes only two indirect references to the possibility that there would be established any such administrative machinery. The first is the provision that the Congress could vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. The second is that the President was authorized to require the opinion in writing of the principal officer in each of the executive departments.

In consequence of this failure on the part of the framers of the Constitution to make any such provision for the exercise of administrative power, our entire constitutional history has been marked by a more or less constant struggle between the executive and legislative branches as to the relative parts which each should play in the exercise of this power. It is undoubtedly true that whatever may have been in the minds of the framers of the Constitution with respect to the exercise of such administrative power, Congress and not the President, has come to be recognized as the primary source of such power. The Congress, not the President, determines what departments, establishments, boards, commissions, agencies, and even Government-owned corporations the Federal government shall have, what offices shall be provided, what compensation shall be paid, and what shall be the specific duties of such administrative organizations. The result is that all administrative officers of the Government, including the President himself in the performance of administrative duties intrusted to him by statute, are but agents of the Congress and subject to its orders and control as and where stated in the statutes. This is pretty much the situation so far as legislation is concerned as it existed under the Articles of Confederation and was recognized as early as 1838, when the Supreme Court of the United States included in its opinion in *Kendall* v. *United States*[7] the observation:

"It by no means follows that every officer in every department of that government [the executive branch] is under the exclusive direction of the President . . . It would be an alarming doctrine, that Congress can not impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."

We were a nation in 1787 of thirteen States sprawled along the Atlantic seaboard with an undetermined wilderness, known as the Northwest Territory, and all having an aggregate population less than that possessed by one of our populous States of today. Even after that government had been in operation for some ten years, the accumulated records thereof were removed from Philadelphia to Washington in a few packing boxes and the entire civilian force in the executive branch consisted of a few dozen clerks. The annual cost of the Government at that time was only $7,851,653 and even as late as 1860, at the commencement of the War between the States, the annual cost of the entire Government was only $63,130,598 which is, in fact, less than the cost today of one of some of our many administrative departments of government. At the close of business seventy years later or in 1930, that cost had mounted to $3,392,077,386 for the entire government, and the per capita cost had grown from something like $2 per annum to approximately $40 per annum. The number of civilian employees of the administrative branch has grown from the few dozen in 1803 to 719,440, as reported by the United States Civil Service Commission for the close of business on June 30, 1936, and this does not include the members of the Army, Navy, Marine Corps, and Coast Guard, aggregating many more. It is beyond the bounds of reason to suppose that any President, in "taking care that the laws be faithfully executed," will be able to supervise the work of approximately a million men and women throughout the length and breadth of this land and in foreign countries who are carrying out the detailed administration of our laws. I emphatically would make it clear that the existing proportions and complexity of our administrative branch of government are not the exclusive responsibility of any one political party but the Federalist, Whigs, Democrats and Republicans who have been in control from time to time, have contributed thereto.

We were largely an agricultural people in 1787. The expanding frontier served us for a time as a national safety valve for the explosive energy of our people. The progressive appropriation of natural resources by small promoters ended with the settlement of the country and with the availability and mobility of vast aggregations of capital for their exploitation, but the succeeding, and to some extent accompanying, growth of industrialism was not far distant even when the Constitution was being written. It is recorded that the Convention adjourned one day to witness John Fitch's novel invention of a boat propelled by steam, which was but the beginning of that harnessing of steam and steel which has made us one of the foremost industrial nations on the globe and which has given rise to the economic and social organizations referred to earlier in this address with attendant problems not dreamed of by the men who watched the Fitch steamboat get under way on that festive occasion.

While the Federal government was growing in territory, in cost of maintenance, in personnel, and in powers conferred on the administrative officers thereof and while these additional powers were often conferred in response to the demands of growing associations, formed by members of large economic and social forces, there has been no rebuilding or readjustments of the administrative ma-

7. 12 Peters, 524, 610.

chinery or in fact any of the powers of government to cope with the maintenance of the necessary equilibrium. Science and invention, capital and labor, commerce and industry have grown mightily since 1787 and so, also, have organized minorities grown in size and power with their paid representatives at the seat of government. Like a general in command of a mighty army, these representatives are at the telegraph key, the telephone, and the radio to marshal and deploy their forces in support of or in opposition to legislation, policies and men. The battle lines are definitely drawn. There is virtue in the fact that often and temporarily these warring minorities tend to equalize each other but the concentration of governmental power and the centralization of such power goes steadily onward. This is nothing new in the history of governments. Polybius in describing the decay of democracy into mob-rule, with the rise of the Man on Horseback, said that men fond of office in a democracy:

". . . ruin their estates, while enticing and corrupting the common people in every possible way. By which means when, in their senseless mania for reputation, they have made the populace ready and greedy to receive bribes, the virtue of democracy is destroyed, and is transformed into a government of violence and the strong hand. For the mob, habituated to feed at the expense of others, and to have its hopes of livelihood in the property of its neighbors, as soon as it has got a leader sufficiently ambitious and daring, being excluded by poverty from the sweets of civil honors, produces a reign of mere violence. Then come tumultuous assemblies, massacres, banishments, redivisions of land; until after losing all traces of civilization, it has once more found a master and a despot."[8]

Also, Thomas Babington Macaulay, the great English man of letters and statesman, stated in a letter of 1857 to an American friend that in seasons of adversity, engendered by the pressure of population, increasing unemployment, and extremes in poverty and wealth:

". . . some Caesar or Napoleon will seize the reins of government with a strong hand or your Republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman empire was in the fifth; with this difference that the Huns and Vandals who ravaged the Roman Empire came from without and that your Huns and Vandals will have been engendered within your country and by your institutions."

While we realize the dangers stated by Polybius and Macaulay and we look about us and see several modern nations which have got themselves men on horseback—dictators and despots—within our own lifetimes, still it is not yet impossible for us to make the readjustments in our machinery of government, within the framework of the basic principles of the Constitution and as expected by the men of 1787, so as to escape these calamities which have befallen the nations of the past as well as some of our contemporaries.

It must be admitted that until now we have made no serious efforts in that direction. As social and economic needs have arisen and as demands of organized minorities have been successful, we have piled departments, establishments, boards, commission, and other agencies on top of one another in bewildering fashion. The inevitable result and some of the practical consequences of our bureaucratic hodge-podge of such numberless governmental agencies have been summarized in a recent publication of the Institute for Government Research of the Brookings Institution, a privately endowed institution with no partisan axe to grind, as follows:

"So great is the complexity, that not merely the ordinary citizen seeking to protect his rights, but even a competent lawyer practising in federal administrative and constitutional law, can scarcely find his way through the jungle. Many agents of the government itself—sometimes the actual authorities who must make quasi-judicial decisions—are uncertain and bewildered concerning these matters."[8a]

There is no time to make a house fireproof when it is burning down. When war or other emergency confronts the nation, there is no time for the necessary study and rebuilding of our machinery of government so as to maintain that equilibrium among the legislative, executive and judicial powers which the men of 1787 outlined in terms of basic principles in the Constitution with complete freedom to those of later years to make the necessary readjustments from time to time so as to maintain that equilibrium. In times of storm and stress we must, of necessity, use temporary makeshifts and that is exactly what we have done in each of our major emergencies and no one should know better than we lawyers that Presidents and political parties are not to be condemned for their failure to rebuild the structure under such trying conditions. The time to make the necessary readjustments in the machinery of government is during peace and during periods of temporary tranquility so that the structure may function when the additional loads are placed on it. That is the time to examine the piecemeal patches and the tinkering done to our rococo structure for the administration of the laws and it is precisely the administrative branch of the Government which must carry the load placed there because of pressing economic, social and political needs or because of demands of organized minorities seeking to enforce on the balance of us what they believe to be their rights.

However, it must be confessed that during such periods of temporary tranquility we have been lulled into a feeling of temporary security and have done nothing in an attempt to new-model our governmental machinery. Heretofore we seem to have been unable to recognize as outmoded what Dean Pound has summarized as the: "Idea of Greek philosophers and Roman lawyers . . . of an ideally stationary society which from time to time would go wrong and had only to be corrected with reference to type." Not so the men of 1787. Hamilton or Madison, we do not know which, stated in the Federalist papers, a truth recognized by Washington, Franklin, and the other leaders of that day, that it would be necessary from time to time to refer to the people as the legitimate fountain of powers "not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others."[9] He further said in this paper that very probably the legislative branch would outbalance the executive and judicial branches and there are references to this fear in the debates in both the Constitutional Convention and in the State ratifying conventions but none of these men visioned an executive branch consisting of nearly 800,000 civilian officers and employees, to say nothing of the military and naval forces in large numbers with a great many of the civilian employees outside of the Civil Service participating in politics, and further to say nothing of organized minorities engaging in propaganda and persuasion in every known form in behalf of their particular nostrums for the ills of the body politic. As a

8. History, Vol. 1, p. 465.

8a. Administration Legislation and Adjudication (1934) p. 262.

9. Federalist No. XLIX, Lodge Edition.

result of all these combinations of forces the administrative branch today greatly overbalances the legislative or judicial branches and political officers are even more anxious than a President that he succeed himself for a second term or that their friends continue in power. Even the Civil Service employees have organized their unions to secure what they conceive to be their just rights!

Yearn as we may for the return of the old order of simple dispensations in government, that day will never come in our generation. Deplore as we may the extent to which bureaucratic government has grown, the manner in which it is entrenched, and the fact that it has been constantly growing through the years, the realities must be faced and that at once so as to take some of the load from the administrative branch of the government and thus restore a better degree of equilibrium in governmental power. The Ship of State is no longer sailing close to the wind and she has not been doing so for many years. Concretely, we can not expect to take an interest in the election of a President once every four years and then expect him to sail that Ship of State close to the wind with a crew of about 800,000 civilian subordinates and a large number of military and naval men. In Congress, which acts as our board of directors, there is a more or less constant turnover in personnel, due to our failure to select men on the basis of merit and keep them in Congress until they are worn out in the harness and must be replaced. Few, if any, members of the Senate and House can afford to become statesmen and devote all of the strength of their mind and body to the problems of the Government and its people in the confident belief that their constituents will retain them in office against all comers so long as they remain honest and perform their duty. Opponents at home are more or less constantly snapping at their heels, constituents are demanding the running of errands for them, and organized minorities are bringing group pressure to bear on the Senators and Congressmen. For lack of time, opportunity, and training Congress can do little more to help the President in the administration of the law than to provide the ship and sails. He has to worry along as best he can with whatever crew he may be able to enlist. Unless the American people, and particularly the lawyers, become vitally and intelligently interested—with support extended to public men, regardless of their politics, who are striving to readjust the machinery of government and sail the Ship of State close to the wind, we reasonably cannot hope to stay for any appreciable length of time the operation of the cycle of government stated by Polybius and which all history, including world history in the making under our very eyes, proves to be substantially correct.

Modern economy has not only become infinitely complex but democracy, and particularly organized minorities therein, have become increasing conscious of the power of the ballot. The conjunction of the two has rendered obsolete the conception of a neutral government in some fields, the device being adopted by some organized minorities of securing the enactment of their plan into a statute with provision therein that the decision of the administrator thereof shall be final and conclusive on the law or the facts or both and then bringing about the appointment of their partisan to administer the law. We cannot hope to escape from any measure of the evils of the existing situation and bring about the necessary readjustment in equilibrium so long as we have political patronage filling the principal offices in the administrative branch of the government for short periods of time with their successors appointed for the same reasons for equally short periods unless we can subject the decisions of such administrative officers to review on both the law and the facts in a trained tribunal absolutely divorced from all control of the administrative officers and the politicians, thus bringing some aid to the Chief Executive in his attempt to keep his crew under control of the law. Even if we could bring about a real Civil Service, similar to that enjoyed by England, with all non-policy making positions filled on the basis of merit—an end which we have not attained in a period of approximately fifty years though we have had Civil Service laws on the books for that length of time—we would be confronted with the situation condemned by both Lord Chief Justice Hewart and the Sankey Commission in their studies of administrative justice in England at the hands of their Civil Service employees. If Englishmen cannot get justice at the hands of their trained administrative officers and employees, we cannot do so at the hands of our untrained and temporary ones. The reason for this is known to none better than the lawyers, and the reason is that a man should not be the judge in his own case nor should any man be prosecutor, judge and jury in any case particularly when his livelihood and career may be greatly influenced by whether his decisions are pleasing to militant minorities.

In practice the administrative agencies with their million or more officers and employees, if we include the military and naval services—and they are in the administrative establishment—must adjudicate rights and privileges in administering the law. The wheels of a great government cannot be stopped while a case which involves no constitutional issue is taken to some one or more of our ninety-odd district courts to determine the rule which should be applied and then find ourselves confronted, perhaps, with a great many different rules in the same class of cases which must be dragged slowly through the circuit courts of appeal and into the overburdened Supreme Court of the United States in an effort to harmonize the decisions and finally determine the rule. We now have that situation in tax cases, even though we realized thirty-six years ago that celerity and certainty in customs cases demanded that we establish specialized courts for determining such cases. Can there be any possible defense in common sense, in justice, or any basis for the multiplicity of remedies, diversities in decisions, delays, confusion, and expense in the reviews of the Commissioner of Internal Revenue in tax cases? If there is, I should like to hear it.

The administrative agencies of the Federal government include corps of experts, such as accountants, engineers, lawyers, and what not and cases are not infrequently decided on complicated sociological data. Elaborate industrial and trade statistics underlie much of their effective work, whether that consists in establishing a policy in the issuance of sub-legislation, formulating a standard, or enunciating a rule—either as a pure act of administration or accomplishing substantially the same result by adjudicating the rights and claims of a citizen. It is humanly impossible for any Chief Executive, the Congress or any group of men to follow through these various administrative acts to see whether the government employees are faithfully executing the laws or whether through incompetence, laziness, mental bias, or even crookedness they are grievously failing in doing so at the expense of the citizen and the Government. There is but one possible method of control and that is by law through machinery so devised that the aggrieved citizen may test out the administrative decision when made in a competent tri-

bunal independent of the administrative officers, the test being on the basis of both the law and the facts.

Closely allied to this situation is the complete inability of the citizen to obtain any authoritative decision as to the rule which will be followed in the administration of particular statutes as they are applied to given states of facts. Take for instance the Robinson-Patman Act which was passed at the last Congress to regulate certain trade practices and where it is of the utmost importance that the business man and his lawyer know in advance what rule will be applied to given states of facts. There is no machinery for obtaining such an authoritative interpretation in advance; the citizen must take a chance that his proposed procedure is correct and be mulcted by a fine with possible imprisonment, under some statutes, if he should be wrong. Why can't we face this situation in a common sense manner and provide that application may be made to a trained tribunal for a ruling in the nature of a declaratory judgment which will protect the citizen until the rule is authoritatively changed? The trial and error method has not been a success in the enforcement of the Interstate Commerce Commission Act, the Federal Trade Commission Act, the Packers and Stockyards Act, the Pure Food and Drug Act, the Immigration laws, or in fact any of our regulatory statutes—any more than such trial and error method has been a success in the enforcement of the Internal Revenue and Custom Acts. We must not only have control by law but we must have an improved technique if the rights of the citizens are to be adequately protected and at the same time sufficient flexibility be left in the administration of the laws so that they can be administered, assuming their constitutionality which might well continue to be tested out in the constitutional courts.

Whether we like it or not, the country has been steadily moving, since the Granger and Populist days, toward a greater social control and that growth has been accelerated since the beginning of the World War. Whether we like it or not, the administration of the law of such social control to the same extent or even more than the administration of any other law often involves the administrative officers at one and the same time in all of the roles of a party interested in rigid enforcement or extension of an economic or social policy, of complainant moving on the basis of preliminary ex parte investigations, as sub-legislator in the issuance of rules and regulations, of prosecutor in the proceedings, of judge in the determination, and of Lord High Executioner in the enforcement of the decision when made. Quite obviously this opens the door to great abuses and violates basic conceptions of impartiality and disinterestedness in the administration of justice and just as quite obviously these duties can not be thrown upon the ordinary courts, with their experimental limitations, their present burdens, and their lack of familiarity with administrative problems.[10] Moreover, even if we should desire to overbalance the judicial branch of the government at the expense of the legislative and executive branches, the Constitution does not permit the ordinary courts to review on appeal many classes of administrative decisions. The legislative courts may make such reviews and legislative courts may be protected in their independence as has been done in the matter of the Custom Courts and the Court of Claims.

Such was the situation in 1933 when the American Bar Association organized its Committee on Administrative Law and directed it to study the condition of affairs in the administrative decision and adjustment of controversies. That Committee has filed three exhaustive reports with the Association and has recommended, in substance, that the exercise of legislative, executive, and judicial powers by the administrative branch of the government should be segregated as much as possible; that the legislative power should be exercised by Congress in accordance with the constitutional mandate except for sub-legislation which should always be canalized between comparatively narrow banks; and that judicial

10. Since delivering the above address, there has come to my attention an address delivered by Mr. Justice Harlan F. Stone, of the Supreme Court of the United States, at Harvard University, August 19-21, 1936, entitled: "The Common Law in the United States" from which I extract the following pertinent paragraphs:

"Perhaps the most striking change in the common law of this country, certainly in recent times, has been the rise of a system of administrative law, dispensed in the first instance through authority delegated to boards and commissions composed of non-judicial officers. The reception by the profession and the courts of these new administrative agencies has exhibited an interesting parallel to their attitude toward other forms of external change. These agencies soon became a matter of concern, not alone because of their novelty and statutory origin, but because they were brought into the law as a means of law enforcement and as the instruments for providing, to a limited extent, remedies for its violation, of which the courts had possessed a virtual monopoly.

"Under the civil law the rise of a system of administrative law, independently of the courts, came as a welcome formulation of principles for the guidance of official action, where no control had existed before. To the common law the use of these administrative agencies came as an encroachment upon the established doctrine of the supremacy of the courts over official action. It was the substitution of new methods of control, often crude and imperfect in their beginnings, for the controls traditionally exercised by courts—a substitution made necessary, not by want of an applicable law, but because the ever expanding activities of government in dealing with the complexities of modern life had made indispensable the adoption of procedures more expeditious and better guided by specialized experience than any which the courts had provided.

"Looking back over the fifty years which have passed since the establishment of the Interstate Commerce Commission, no one can now seriously doubt the possibility of establishing an administrative system which can be made to satisfy and harmonize the requirements of due process and the common-law ideal of supremacy of law, on the one hand, and the demand, on the other, that government be afforded a needed means to function, freed from the necessity of strict conformity to the traditional procedure of the courts.

"Rarely in the history of the law has such an opportunity come to our profession to carry forward a creative work which would enable the law to satisfy the pressing needs of a changing order without the loss of essential values. The ultimate establishment of equity, after a period of resistance, as a coordinate branch of the law, ameliorating the rigors of the common-law system and translating in some measure moral into juristic obligations, is a comparable transition in the law. The profession of our day, like its predecessors who saw in the pretensions of the chancellor but a new danger to the common law, has given little evidence that it sees in this new method of administrative control any opportunity except for resistance to a strange and therefore unwelcome innovation.

"Addresses before bar associations twenty years ago, discussing the rise of new administrative agencies, are reminiscent of the distrust of equity displayed by the common-law judges led by Coke, and of their resistance to its expansion. We still get the reverberations of these early fulminations in renewed alarms at our growing administrative bureaucracy and the new despotism of boards and commissions. So far as these nostalgic yearnings for an era that has passed would encourage us to stay the tide of a needed reform, they are destined to share the fate of the obstacles which Coke and his colleagues sought to place in the way of the extension of the beneficent sway of equity. These warnings should be turned to account, not in futile resistance to the inevitable, or in efforts to restrict to needlessly narrow limits activities which administrative officers can perform better than the courts, but as inspiration to the performance of the creative service which the bar and courts are privileged to render in bringing into our law the undoubted advantages of the new agencies as efficient working implements of government, surrounded, at the same time, with every needful guarantee against abuse."

functions in the settlement of administrative controversies should be transferred to a specialized tribunal which, for want of a better name, has been tentatively named "An Administrative Court." Where such judicial powers can not be transferred to a legislative court, then the legislative court should be authorized to hear appeals from such administrative decisions on both the law and the facts.

As I have indicated, we now have such legislative courts named the Court of Claims and the Customs Court as well as the Court of Customs and Patent Appeals. We have other tribunals such as the Board of Tax Appeals, the Trade Commission, and the Interstate Commerce Commission which are legislative tribunals and with many of the attributes of legislative courts except for life tenure. The three reports of the Committee on Administrative Law have met with almost universal commendation of the editorial writers for the newspapers of the country and except for opposition the part of small groups within and without the administrative branch of the Government, there is general agreement that the adoption of the proposal of the Committee, as twice approved by the American Bar Association, for an administrative court will operate to bring about a readjustment in our machinery of government so as to result in a better degree of equilibrium as among the three great departments of the government.

The organization and jurisdiction of such a court —that is, details of such a court—are naturally the subject of some dispute. It is not to be expected that administrative subordinates will in all cases welcome a complete review of their decisions on their merits and there are few of such administrative organizations which do not have their friends and partisans in organized minorities who will lend assistance in an attempt to except such administrative agencies from independent reviews of their decisions. The same condition has confronted Congress and the President for many years in any effective attempt to reorganize the administrative services. The matter is now under study by the Committee pursuant to a mandate of the Boston meeting of the American Bar Association. Quite obviously, such jurisdiction as is conferred must be by a court especially created for that purpose, or by existing separate legislative courts, or by consolidating existing legislative tribunals as a nucleus and adding sufficient judges to carry on the work and make the court ambulatory so that the citizen and his lawyer may have the case reviewed in their localities instead of taking the case to Washington as is now generally the requirement except in the Board of Tax Appeals and the Customs Court, both of which are now ambulatory. Also, quite obviously, all administrative decisions can not be made reviewable by that court. The opposition on the part of organized minorities would make such an attempt difficult if not impossible of attainment at one time, and so we may have to do it by piece-meal. It is a question of expediency as to which class of the principal controversies between the administrative branch and the citizen should be selected either for transfer of the judicial functions or for review of the administrative decisions on the basis of both the law and the facts. Closely connected with the problem of bringing some order out of the existing confusion and chaos in this respect is the giving to such a court jurisdiction of the discipline of lawyers practicing before the administrative officers of the government and the question whether other than lawyers subject to such discipline shall be permitted to carry on a so-called law practice before such administrative officers and tribunals with attendant solicitation of business and in some instances with attempted use of political pressure.

Such, my friends, is the great problem confronting the American people of today in the matter of attain-

(*Continued on page* 870)

HOUSE OF DELEGATES FACES IMPORTANT WORK AT COLUMBUS

PROGRAMMED for "a working meeting," the members of the American Bar Association's House of Delegates of the Legal Profession are scheduled to open three days of sessions of the House at 2 o'clock p. m. on Tuesday, January 5, at Columbus, Ohio.

Important topics on the calendar for the meeting include: a consideration of conditions in and affecting the profession of the law; judicial selection and tenure, with emphasis on the part organizations of the bar are playing and must play in the future in this field; a survey of the work being performed by the sections and committees of the American Bar Association with a discussion of suggestions for co-ordinating the effort of organizations of lawyers, judges and teachers in the interest of the public and the profession; a report on the so-called Wagner bill with respect to practice before agencies of the federal government (ordered by the annual meeting at Boston); a report by the Committee on Admiralty and Maritime Law (ordered by the House at Boston); and adoption of the permanent rules for the governance of the House.

All sessions of the House will be held at the Deshler-Wallick Hotel. Members of the Association will be welcome observers at these sessions, subject, of course, to the order of the House for a closed session. There is no probability, however, that more than one session, at most, will come within that category.

In addition to the meeting of the House, the Board of Governors has been called to convene at 10 o'clock A. M. on Monday, January 4, and the State Delegates at 9 o'clock A. M. on Tuesday, January 5. It is also probable that certain Section Councils and Committees will meet during the week beginning Sunday, January 3, in accordance with the prior custom of such groups to gather at the time and place of the January meeting of the former Executive Committee of the Association.

The members of the bar of Columbus and of the State of Ohio will act as hosts. The local bar association is planning such a social program for Tuesday and Wednesday, January 5 and 6, as the crowded business calendar will permit. On Thursday night at Dayton, the Ohio State Bar Association will open its mid-winter meeting with an American Bar Association Dinner. Members of the House will be guests of the State Association on that night and will be furnished com-

plimentary transportation to and from Dayton on a special train.

The bar of Columbus is eager to display a sample of the hospitality that would have enveloped the members of the national Association if Columbus had been chosen as the place of the 1937 annual meeting. It is expected that all members of the American Bar Association present during the meeting of the House will be invited to participate in the social program of the Columbus Bar Association, the details of which will be sent to all members of the House by President Willis H. Liggett of the Columbus Bar Association and Chairman W. Lytle Zuber of its Entertainment Committee.

Diversion and entertainment will be provided for the ladies of the members of the American Bar Association present in Columbus during the meeting of the House and such ladies are cordially invited to Columbus.

In arranging for the coming meeting it was feared that the machinery for the selection and sending of delegates from state, local and affiliated associations might not be sufficiently developed so soon after the creation of the House as to assure the financing by such organizations of a full attendance of their delegates. To encourage such attendance at a gathering deemed to be vital to the functioning of the reorganized national Association, the Board of Governors, as a quasi-emergency measure, has voted to pay the travel and hotel expenses of the members of the House present at the Columbus meeting. Guarded by the statement that such action is not to be construed as setting any precedent whatever, this decision, it is hoped, will prove to have been warranted by the number and zeal of House members who convene in January.

A tentative program for the House meeting follows. A definitive calendar is expected to be sent to all members very shortly.

FIRST SESSION

Tuesday, January 5, at 2 P. M.

Address of Welcome on behalf of the Ohio State and Columbus Bar Associations.

Response on behalf of the House of Delegates.

Report of the Committee on Credentials and Admissions.

Roll call.

Report of the Committee to Draft Rules of Procedure for the House of Delegates.

Adoption of Rules of Procedure for the House of Delegates.

Report of the Board of Governors to the House of Delegates.

SECOND SESSION

Wednesday, January 6, at 10 A. M.

Report of the Association's Special Committee on Unauthorized Practice of Law as to resolution endorsing the Wagner Bill (S. 2944; 74th Congress, 2nd Session); referred to this Committee by the House of Delegates on August 27, 1936, after adoption by the Assembly.

Report from Conference of Section Chairmen with respect to work of the sections and proposals for coordinating these activities and the effort of state and local bar associations and affiliated organizations of the legal profession.

Report from the Conference of Chairmen of Standing and Special Committees of the Association with respect to the work of such committees and proposals for coordinating these activities and the effort of state and local bar associations and affiliated organizations of the legal profession.

General discussion of these two reports.

THIRD SESSION

Wednesday, January 6, at 2 P. M.

Consideration of Conditions in and Affecting the Legal Profession. (This session may, upon order of the House, be made a closed session.)

The discussion of the following topics will be outlined in three, or four, ten minute addresses. A Committee on Draft will be asked to formulate for consideration suitable resolution to give effect to any consensus which may develop through the discussions.

Is there an over-crowding in the profession and, if so, what action should be taken with respect to this condition? Should changes be made in the standards of legal education and admissions to the bar? Is adoption of a quota system desirable in any localities?

Are the interests of the public and the profession endangered by the increasing number of supervisory boards, bureaus, commissions, etc., in government and by the authority vested in such bodies, or their methods of procedure. What, if anything, should the profession do about the matter?

What national or restricted surveys, if any, as to conditions in and affecting the legal profession should be undertaken, or considered, by the American Bar Association?

FOURTH SESSION

Wednesday, January 6, at 8 P. M.

Judicial Selection and Tenure.

The discussion of the following topics will be outlined in two, or three, ten minute addresses. The Committee on Draft will formulate for action any resolutions which the discussion makes suitable.

What has experience shown as to the relative desirability of existing methods of selection of judges?

What terms of office have been found to yield the best results?

What procedure and grounds for removal of judges have been found to be the most satisfactory?

What practical steps should be taken to improve the existing situation and what part should the organized bar play in such action?

FIFTH SESSION

Thursday, January 7, at 10 A. M.

Report of the Association's Committee on Admiralty and Maritime Law respecting the recommendations of the minority of the 1935-1936 Committee concerning safety at sea, as referred to this Committee by the House on August 28, 1936.

Consideration of matters which may be presented by any state or local bar association, or any affiliated organization represented in the House.

Consideration of matters which may be presented by any Section or Standing or Special Committee of the Association.

Report of the House Committee on Hearings.

Report of the House Committee on Draft.

Unfinished business.

New business.

Adjournment.

COLUMBUS STATUE AND FAÇADE OF STATE HOUSE

OHIO STATE OFFICE BUILDING

GOVERNOR'S MANSION

AERIAL VIEW OF DOWN TOWN, COLUMBUS, OHIO

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
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CONCERNING SCANDAL-BOOKS

Man has inherited diverse things from his ancestors, near and remote, and many obscure "complexes" go to make up his frame of mind. The stable-boy complex is one. Supply and demand keep catching up with each other, and calumnious books and plays will be written and given out to the public for a very long time to come. The garbage-can as a source of literature seems like the widow's cruse. It is inexhaustible, no matter how deeply drawn from. This is not a field in which government can act effectively, in the long run; the only remedy is (in the words of Justice Holmes) for men to become more civilized.

The occasion of these remarks is the appearance of another volume in a series, the first publication of which marked a distinct civic throw-back. This new book has to do with an honored Court. The authors are very sophisticated: they know what you are thinking about when you are asleep. The conference-room has no secrets for them. "During the confidential debate" on a certain case, Justice X. "at first appeared to be with the minority." Justice Y.'s "basic philosophy comes into clearest relief during the private chamber sessions of the Court." As for another Justice, "in the privacy of his home or of the Court's closed-door deliberations, he has been as relentless in his denunciations" (etc.). "The really important part of the case took place in the confidential court discussions before the decision was rendered."

What the Justices eat for breakfast, or for dessert at lunch, whose portraits they have on their study walls, what they say to each other on the golf-course (no spectators present,) are known to the two authors, and excite sour thoughts. It is as if one of these authors were hidden in the room, behind (or perhaps in) a cuspidor. In their bright lexicon the words "private" and "confidential" do indeed occur, but they do not mean anything.

All is fish that comes to the authors' net. What Congressman Zioncheck said about a certain decision is faithfully recorded. When the authors run out of facts they resort to their imaginations, a field that has been kept fertile through the years by a very old process, familiar to all farmers and gardeners.

A book like this can't lose. If the book is answered, it is like having the police raid a show; the usual effect is just some more advertising. The publishers are respectable men who wish to make money. If a book is not going to be read, it might as well not be printed.

You will not observe this book very often, for the reader is likely to put it away when anyone comes along. Even a moron does not wish to be seen publicly eating carrion.

A WORKING MEETING

A glance at the agenda of the forthcoming meeting of the House of Delegates at Columbus leaves no doubt that it will be a "working meeting." It also leaves no doubt that the delegates will face and consider some of the most important problems of the profession.

They will do this with the added authority and sense of responsibility that go with their representative character. It cannot be said that their decision will represent the views of merely a small fraction of the Bar of the country or even of the membership of the American Bar Association. In a true sense they will speak and act for the Bar of the Nation.

It is natural to find the subject of Judicial Selection and Tenure prominent on the program. It was also to be expected that coordination as an active principle would be in evidence, as it is in that part of the program which refers to the coordination of the work of the Sections and Committees with the work of similar bodies in the State and local Bar Associations.

Good Will for Lawyers

BY MITCHELL DAWSON
Chairman of Committee on Public Relations of Chicago Bar Association

"JUDGE, your honor, he only seems to be happy when he makes me miserable. I don't care for myself, but he beats the little girl . . ."

"Your honor, I invested $1600 in a manufacturing business, but I can't get any accounting . . ."

"I was married, your honor, and couldn't get along with my mother-in-law. She believed in spirits, and one night my husband accused me of witch-craft . . ."

"Your honor, judge, I married a girl out of a barroom. I tried to make a good girl out of her, but couldn't and left her . . ."

"Your honor, I've written a book. It's fiction. It's life. It's a very good book and I want to protect it . . ."

"My wife ate lobster at a restaurant, your honor, and it made her ill. We made a claim, but the insurance company turned us down . . ."

One by one they parade before the microphone and tell their troubles to a judge—two judges—who hold a pseudo court in a broadcasting studio in New York City. A suave impresario marshals them, keeps their recitals within bounds, and elicits advice from one of the judges.

This program is called "The Good Will Court." It is broadcast every Sunday night on a national network. Lawyers throughout the United States have been asking: Good will for whom?

Not for the lawyers certainly: The Good Will Court purports to be a free legal aid clinic. The public is led to believe that lawyers are expensive and out of the reach of the average person. Some "clients" of the Good Will Court relate stories of deception by lawyers which would probably prove to be without foundation if investigated. Nor is any intimation given that the bar has made provision for disciplining its members. The announcer says that the program is not meant to supplant the services of lawyers, but its very existence contradicts him.

Not for legal aid bureaus and other social agencies: The impression is indirectly conveyed that the poor and unfortunate have no place to turn for free legal advice.

Not for the courts: Thoughtful persons may well wonder how a judge can participate in a commercial radio program and give advice ex parte to people who may conceivably appear before him later as litigants.

The good will which the Good Will Court seeks to engender is obviously good will for its sponsor—a corporation in the business of selling a certain commodity. The legal advice, which it so benevolently dispenses to the unfortunates who apply for it, is paid for magnificently in sales of the sponsor's merchandise. As the announcer says, "This program is made possible by your purchase of ————————"

Does the Good Will Court constitute the unlawful practice of law? The problem is new and only the courts can answer. But it is certain that lawyers everywhere are thoroughly aroused against it. The State Bar of California recently passed a resolution as follows:

"Whereas certain radio stations in this state and elsewhere have been conducting programs in which judges and lawyers participate and in which judges give legal advice over the air to persons seeking such advice and whereas such practice is in the judgment of the Board of Governors of the State Bar contrary to the best traditions of the bench and bar and the dignity and high standards of the judiciary, it is therefore resolved that such radio programs and such conduct by judges and lawyers are strongly disapproved and that it is earnestly urged that it be discontinued."

Other bar associations have expressed themselves in similar terms, and the Committee on Ethics of the American Bar Association has also rendered its opinion which appears elsewhere in this number of the Journal.

But the bar's disapproval of the Good Will Court may meet with little sympathy from the general public. Our motives may be construed as purely selfish. We may be told that we are dogs in the manger without sympathy for the poor.

For this we shall have only ourselves to blame. The air has been available for many years. It might have been used with tremendous effect as an instrument for creating a more favorable public response toward lawyers. The organized bar might well have offered the radio audience an informational service that would have forestalled or at least minimized the effect of such programs as the Good Will Court.

It is true that the American Bar Association sponsored three very successful series of radio talks in 1933 and 1934 under the direction of Mr. Will Shafroth, and a number of local associations have gone on the air from time to time with talks, debates and dramatizations, more or less effectively. But efforts of this sort have been brief and limited in scope.

The Good Will Court is a voice which by implication says to a multitudinous radio audience that the lawyers have failed in their duty to society. The impression conveyed is false, but no effective measures have been taken to correct it.

Lay hostility to the bar can be counteracted, I believe, by a well-planned permanent educational campaign. Such a campaign to be successful would require the cooperation of the entire organized bar. It would naturally be dual in its nature. Certain general material, national in scope, might be disseminated through the American Bar Association, which has already prepared the way by its successful promotion of the national bar program. Matters of local concern, such as building up public support for improvements in the methods of selecting judges and changes in court organization, should be left to the local and state associations. But both efforts should be coordinated and carried on continuously with the utmost tact, imagination and resourcefulness. To prove the practicability of such an undertaking, I need only call attention to the success of our professional brethren, the doctors, in gaining public respect and good will through educational efforts. The results have been far beyond their original expectations.

Various media besides the radio are available for reaching and forming public opinion, but space will not permit a detailed discussion at this time of the channels of propaganda, the type of material to be presented or the method of approach. I wish merely to emphasize the importance of depicting the activities of lawyers and courts in concrete terms.

Lawyers assure one another at bar association meetings that they must maintain their traditions, ideals, duties and responsibilities. These are truisms that are "gone with the wind." What we need to show is a picture of the lawyer in action, the lawyer as hero, if you please, but a very human practical hero, whose services to his clients and to society are personal, concrete, obvious and invaluable.

REVIEW OF RECENT SUPREME COURT DECISIONS

Practice of Federal Courts in Virginia under Conformity Act—Jury Verdict for Much Less Than Sworn Proof of Loss, under Insurance Policy, Insufficient Proof of Fraud, without More, to Justify Appellate Court in Reversing and Entering Order for Arrest of Judgment—Fine for Contempt in Proceedings Supplementary to Judgment in Federal District Court—Consent to Plan of Reorganization under Section 77B—Where Complaint Fails to Show Plaintiff Entitled to Relief, Court of Equity Will Not Consider Failure to Join Others as Necessary Parties—Dismissal of Proceedings for Reorganization under Section 77B—Priority of Claims under Sec. 64b of Bankruptcy Act.

By Edgar B. Tolman*

THE cases reviewed in this issue have special interest in that they all deal with cases in which certiorari was granted by the court.

It hardly needs stating, that certiorari is allowed in relatively few cases, that the allowance is a matter of discretion and not of right, and that the discretion is exercised only in cases so presented that the court is satisfied that either because of the importance of the question of Federal law involved or of the conflict of decision disclosed between the Circuit Courts of Appeals, the challenged decision should be re-examined.

In the cases reviewed on certiorari in which opinions were filed November 9th the following classes of questions were deemed of sufficient importance to warrant the exercise by the Supreme Court of its rarely used discretionary power; those involving some aspects of the law governing federal jurisdiction, the interpretation of the phrase "controversies arising under the constitution and laws of the United States," corporate reorganization under 77B, extradition as affected by the treaty between France and the United States, national banks, and state and federal taxation.

Federal Procedure—The Conformity Act—The Virginia "Motion for Judgment"

Federal courts in Virginia under the Conformity Act, must follow the Virginia practice in actions at law whereby a notice of motion for judgment is accepted as a substitute for a writ or other process issued from a court.

Chisholm v. *Gilmer, Receiver,* 81 Adv. Op. 21; 57 Sup. Ct. Rep. 65.

Certiorari was allowed in this case to set at rest a controversy as to an important question of procedure. The suit was instituted by the receiver of a national bank in a United States District Court in Virginia, for the recovery from the bank's shareholders, of a 100 per cent assessment made by the Comptroller of the Currency. The liability was sought to be enforced by service of a notice of motion for judgment, in which notice was incorporated a statement of the facts making up the claim. This method of procedure was challenged for lack of jurisdiction on the ground that the notice, considered as process, was unavailing to bring them into court. Judgment on the merits went against the stockholders and the Court of Appeals for the Fourth Circuit affirmed.

Mr. Justice Cardozo delivered the opinion of the court. After stating the controversy involved and the course of the case through the courts, he said:

"The remedy by notice of motion in Virginia is governed by section 6046 of the Virginia Code. 'Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion.' The remedy is an ancient one. It goes back to 1732, though at first it was limited to claims for public moneys payable by sheriffs. Acts of May, 1732, c. 10 § 8, 4 Va. Stat. (Hening) 352. Gradually it was extended to other situations. As early as 1849 it was made applicable to claims on contracts generally. Virginia Code (1849), c. 167, § 5. From contracts it spread to torts (Virginia Acts (1912) 5), and to statutory penalties. *Ibid.* 651. A revision of the Code in 1919 made the remedy even broader. Virginia Code, 1919, § 6046. The history of the development has been traced with painstaking precision by students of procedure."

Mr. Justice Cardozo comments on the fact that in the Virginia Courts this remedy has almost superseded the common law forms of action and that in the Federal courts held in the same territory, the new procedure has succeeded to a large extent in crowding out the old.

Coming to the exposition of the Conformity Act, quoting from and interpreting its provisions, he said:

"'The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.' How a suit shall be begun, whether by writ or by informal notice, is a question of the practice of the state or of its forms and modes of proceeding. *Amy v. Watertown,* No. 1, 130 U. S. 301, 304. The Constitution of the United States does not attempt to make a choice between one method and another, provided only that the method employed 'gives reasonable notice and affords fair opportunity to be heard before the issues are determined.' *Iowa Central R. Co. v. Iowa,* 160 U. S. 389, 393. The remedy by notice of motion has had repeated approval by the highest court of Virginia. *Virginia Hot Springs Co. v. Schreck,* 131 Va.; . . . It is here sought to be applied, not in equity or admiralty (*Coffey v. United States,* 117 U. S. 233), but in a common law cause, a quasi-contractual obligation being the source of liability . . . A federal court, adhering to the Conformity Act, must follow the local practice, unless some other act of Congress, creating an exception to the general duty of conformity, has declared a special rule . . . *Whitford v. Clark County,* 119 U. S. 522; *Southern Pacific Co. v. Denton,* 146 U. S. 202, 209."

Petitioner's counsel pointed to 28 U S C § 721 which provided that federal process and rights should be under the seal of the court and signed by the Clerk as establishing an exception to the Conformity Act, but this argument was rejected and the learned justice said:

"We do not essay a definition of the word process in every context. It may take on varying shades of meaning in varying surroundings. For present purposes it is enough to

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say that a notice of motion, if process at all, is not process issuing from a court, and assuredly is not a writ. Only writs or processes so issuing are governed by the statute. This is the view expressed more than thirty years ago by Judge McDowell in two cases (*Leas & M'Vitty v. Merriman, supra,* and *Schofield v. Palmer,* 134 Fed. 753), which did much, we may be confident, to guide the conduct of the federal bar in adhering to the Virginia practice. It is the view expressed by Judge (later Mr. Justice) Sanford in the District Court of Tennessee. 'In any proceeding which may be properly instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of secion 911 have no application.' *In re Condemnation Suits by United States,* 234 Fed. 443, 445. It is the view accepted by the Court of Appeals for the Fourth Circuit in *Eley v. Gamble, supra,* and again in the case at hand.

"There is instruction also in many state decisions dealing with cognate questions. The Constitution of Virginia prescribes (§ 106) that 'writs shall run in the name of the "Commonwealth of Virginia," and be attested by the clerks of the several courts.' The Virginia courts have perceived nothing in that mandate at war with the validity of a summary notice of motion signed and issued by the parties. (Citing cases.) In many other states constitutional or statutory provisions as to the form of writs and other 'process' have received a like construction. (Citing many cases.) The analogy is apt and the reasoning persuasive.

"Petitioners lean heavily upon early decisions in the District and Circuit Courts for New York wherein the requirements of R. S. § 911 were held to be applicable to the New York form of summons. *Peaslee v. Haberstro,* (1879) Fed. Cas. No. 10884, 15 Blatch. 472; *Dwight v. Merritt,* (1880) 4 Fed. 614. In so far as these decisions and others following them (*United States v. Mitchell,* 223 Fed. 805) extend the rule of the statute to notices or forms of process not issuing from a court, they do not have our approval.

"Petitioners suggest that the use of a notice of motion as a substitute for a summons is forbidden by Rule 14 adopted by the District Court of the Eastern District of Virginia. The same objection was adequately answered in *Eley v. Gamble, supra,* pp. 173, 174. If the rule has such a meaning it is inconsistent with the Conformity Act which governs practice in the district courts, 'any rule of court to the contrary notwithstanding.' "

The judgment was affirmed.

The case was argued by Minitree J. Fulton for the stockholders and by George Gilmer for the receiver of the bank.

Insurance—Fire Insurance Policy—Forfeiture in Case of False Claim—Practice

Where plaintiff filed sworn proof of loss of $35,000, the fact that the verdict of the jury was for only $17,000 does not, without more, constitute proof of fraud which would justify an appellate tribunal in reversing the case and instructing the lower court to enter an order in arrest of judgment.

Soler & Co., Inc. v. *United Firemen's Insurance Co.,* 81 Adv. Op. 50; 57 Sup. Ct. Rep. 54.

This case arose in an action brought by the petitioner to recover on a fire insurance policy. The policy was for $30,000, distributed in the amount of $15,000 on a stock of merchandise, $12,000 on machinery, and $3,000 on furniture and fixtures. The petitioner presented a sworn proof of claim, after a fire, for $35,000, and demanded the full amount of the policy. The Insurance Company refused the claim, and an action followed in the federal court for Puerto Rico. It resulted in a verdict and judgment for $17,000 plus interest. A bill of exceptions and ten assignments of error were filed, and an appeal was taken to the Circuit Court of Appeals.

That Court affirmed the judgment; but on a rehearing reversed the judgment, with a dissenting opinion by the judge who had delivered the opinion of affirmance. On certiorari the final ruling of the Circuit Court of Appeals was reversed by the Supreme Court, and the judgment of the District Court was affirmed in an opinion by MR. JUSTICE MCREYNOLDS.

In reviewing the proceedings, the Court discussed both opinions of the Circuit Court. It appears that the policy sued on contains the so-called "Iron Safe" clause, which requires the assured to keep an inventory and complete accounts of business "securely locked in a fireproof safe at night." Certain conditions were also inserted in the policy, including one numbered 12, that "If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured * * * to obtain any benefit under this policy; * * * all benefit under this policy shall be forfeited."

The tenth assignment of error raised the question whether the plaintiff's claim of a value of about $34,000 was not shown to be fraudulent as a matter of law, by the verdict finding a value of only $17,000. The Circuit Court in its first opinion had stated that this question was one for the trial judge to pass on in the first instance; that it had not been presented to him; and that he had not passed on it; nor was any ruling of his with respect to it excepted to.

In its second opinion, the Circuit Court concluded that no bill of exceptions was necessary to preserve for review the question raised by the tenth assignment of error, for the reason that the record proper (i.e. exclusive of the bill of exceptions), made it plain that the proof of loss was fraudulent. Examining the second opinion of the Circuit Court on this aspect of the case, MR. JUSTICE MCREYNOLDS quoted from it as follows:

" 'In considering the question raised by the 10th assignment the evidence introduced at the trial and brought here by bill of exceptions is not to be considered, for that is no part of the record proper. The inquiry is confined to such matters as appear in the record proper. That record in this case includes the complaint, proof of loss and the policy (which are included in the complaint), the verdict and judgment.' It is perfectly plain that the verdict of the jury is entirely inconsistent with the allegation of the complaint and the proof of loss, and we think this disparity of nearly $18,000.00 shows on its face and as a matter of law that the sworn proof of loss was fraudulent and, if so, then, under the 12th condition of the policy, all benefit thereunder was forfeited. The verdict should have been either for nothing or in the neighborhood of $30,000.00."

This conclusion was rejected by the Supreme Court with the following comment by MR. JUSTICE MCREYNOLDS:

"The second opinion holds in effect that fraud by the plaintiff conclusively appears on the face of the record without giving consideration to any evidence; also that fraud on its part with respect to the item 'Labor on goods in process' included in the proof of loss so clearly appeared from the evidence that the defendant was entitled to a directed verdict.

"We cannot accept the view that a conclusive presumption of fraud arose because the verdict was far less than the amount stated in the proof of loss. If the bill of exceptions be disregarded we must assume the jury was properly instructed—were told that condition 12 required a verdict for the insurer 'if the claim be in any respect fraudulent.' The finding for the assured indicates that they discovered no fraud. Policy holders may present inaccurate proofs of loss without conscious dishonesty or intent to defraud; different views of values are common; memory is faulty; insurance company and assured often entertain

widely different views concerning the policy; and evidence cannot always be produced to establish something declared to be true in entire good faith."

Contentions were also pressed to the effect that there was complete failure to sustain a loss of some $2500 as the cost of labor on goods in process, and that this raised a conclusive presumption of purpose to defraud. In view of the verdict for the assured, the Court was unwilling to rule that such presumption was established.

The case was argued by Mr. Francis H. Dexter for the petitioner, and by Mr. Henri Brown for the respondent.

Procedure—Proceedings Supplementary to Judgment—Fine for Contempt—Appeal

In proceedings supplementary to judgment, an order of a federal district court adjudging the judgment debtor guilty of a civil contempt, and imposing a fine therefor, is not subject to appeal to the circuit court of appeals by a party to the suit, except in connection with an appeal from a final judgment or decree.

Fox v *Capital Company,* 81 Adv. Op. 40; 57 Sup. Rep. 57.

This case dealt with a question as to the jurisdiction of a Circuit Court of Appeals to review on appeal an order fining a judgment debtor for contempt in refusing to submit to examination in proceedings supplementary to judgment.

The respondent had judgment against the petitioner for $297,412.91 in a federal court in New York, and, by subpoena, instituted proceedings supplementary to judgment, as provided in the New York Civil Practice Act, for examination of the judgment debtor. The debtor failed to respond, and was adjudged in contempt, with leave to purge himself. Further proceedings resulted in a fine of $235,082.03, the unpaid amount of the judgment, and an additional amount of $10,000 to be paid to attorneys for the creditors for the costs of the proceeding. A warrant was to issue whereby the debtor was to be jailed until payment of the fine, but with a proviso that, except for the $10,000 costs, the fine was to be remitted upon submission to the subpoena.

The debtor appealed from both the order adjudging him in contempt, and the order imposing the fine. The Circuit Court of Appeals dismissed the appeal. Certiorari was granted by the Supreme Court, limiting the review to the question of the jurisdiction of the Circuit Court of Appeals.

In the Supreme Court the dismissal was affirmed in an opinion by MR. JUSTICE CARDOZO, on the ground that the order was not final, and consequently not subject to appeal. In dealing with the question, MR. JUSTICE CARDOZO first reviewed the characteristics of supplementary proceedings in New York, and then pointed out that a party to a suit may not appeal from an order punishing for civil contempt, except in connection with an appeal from a final judgment or decree, which was not the case here. As to the latter, the opinion states:

"The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt. . . . The appellant in the court below, the petitioner before us here, was a party to a suit or proceeding for the discovery of assets. There is no occasion to consider how far his rights and remedies would be different if he had been a stranger to the record, a witness or an adverse claimant . . . Not only was he a party; he was a party to a proceeding then in its initial stages. Discovery was in abeyance, and what the final relief would be was still a subject for conjecture. This sufficiently appears from the statement already made as to the function and duration of a proceeding supplementary to judgment. Finally, the contempt charged and adjudicated was not criminal, but civil; reparation to an obstructed creditor, not vindication of the public justice, was the purpose of the fine, and of the fine in all its parts. . . . If this could otherwise be doubtful, it is made clear beyond cavil by the recitals of the order.

"Petitioner does not question the compensatory or civil quality of so much of the fine as may be avoided at any time by obeying the subpoena. He takes the ground, however, that the fine of $10,000 which was imposed unconditionally, is in excess of any damage suffered by force of the contempt . . . and from this he moves to the conclusion that the penalty was inflicted as retribution for a crime. But the conclusion does not follow though the premise be accepted. The court may have erred in its assessment of the costs required for reparation. As to that we do not intimate an opinion either one way or the other. What is very plain is the fact that the assessment was made in a genuine endeavor to reimburse a harassed creditor for the damages occasioned by obstruction and delay. Errors, if there were any, did not split the controversy into parts, one civil and one criminal. . . . It retained from first to last its unitary quality. In levying the fine, the court was not acting *sua sponte,* or at the instance of the government through a prosecuting officer. . . . It lent a helping hand to a suppliant for aid.

"The order is not final, and there is no error in the ruling that it is not subject to appeal."

The case was argued by Mr. Benjamin Reass for the petitioner, and by Mr. William D. Whitney for the respondent.

Bankruptcy—Reorganization Under Section 77B—Consent to Plan of Reorganization, When Not Required

Stockholders and creditors of a corporation undergoing reorganization under Section 77B show no injury resulting to them through confirmation of a plan of reorganization without their consent, where it is found by the court that their claims are of no value.

In the Matter of 620 *Church Street Building Corporation, et al.,* 81 Adv. Op. 58; 57 Sup. Ct. Rep. 88.

The petitioners, being the debtor, stockholders, and the holders of the second and third mortgages, object to the confirmation of a plan of reorganization of the debtor corporation. Its principal assets consist of certain leaseholds and improvements knowns as the Carlson Building Annex. The allowed claims include first mortgage bonds of $445,000 plus interest from January 1, 1931, second mortgage notes for $40,250 plus interest from December, 1929, and a third mortgage note for $27,000 plus interest from December, 1931. The District Court found that the property has a fair market value of $245,025; that there is no equity above the first mortgage bonds; that the debtor is insolvent; that the claims of junior lienors and holders of the second and third mortgages are of no value, and hence entitled to no cash or securities under the plan; that the stockholders are not entitled to participate; and that the plan is "fair, equitable, and feasible and does not discriminate unfairly in favor of any class or classes of creditors or stockholders."

The Circuit Court of Appeals denied leave to appeal from the order confirming the plan of reorganization. On certiorari, this was affirmed by the Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES. He pointed out that, since the findings showed that the claims of the petitioners were of no value, confirmation without their consent to the plan constituted no injury as to them. With reference to this, the Court said:

"The evidence before the District Court is not presented by the record. And as the Court of Appeals, if the appeal had been allowed, could have revised the ruling of

the court below only in matter of law, it necessarily follows —and was conceded at the bar—that petitioners are bound by the findings of fact. Petitioners insist that their consent to the plan of reorganization was necessary or that their claims should have been accorded 'adequate protection.' But the adequate protection to which the statute refers is 'for the realization of the value of the interests, claims or liens' affected. Here the controlling finding is not only that there was no equity in the property above the first mortgage but that petitioners' claims were appraised by the court as having 'no value.' There was no value to be protected. This finding embraces whatever interests petitioners may have as junior lienors under the Illinois law and, in the same aspect, the constitutional argument is unavailing as petitioners have not shown injury. . . .

"The Circuit Court of Appeals did not abuse its discretion in declining to allow an appeal."

The case was argued by Mr. Thomas E. Rein and Mr. Isaac M. Mills for the petitioners, and by Mr. Georgé T. Buckingham and Mr. Isaac E. Ferguson for the respondents.

Federal Procedure—Parties—Failure to State a Case Entitling Plaintiff to Relief

If a bill of complaint in equity fails to show that the plaintiff is entitled to relief, the court will not consider whether the bill is defective for failure to join others as necessary parties.

If the merits may be determined without prejudice to the rights of absent parties "a court of equity will strain hard to reach that result."

Bourdieu v. *Pacific Western Oil Company, et al.*, 81 Adv. Op. 3; 57 Sup. Ct. Rep. 51.

This opinion dealt with a suit brought by the petitioner to have impressed in his favor a trust in respect of a portion of a lease, executed by the United States, of oil and gas lands in California.

The bill alleged that the petitioner since March, 1919, has owned certain described lands in California, and by reason thereof was entitled to a preference right for a permit to prospect on the land for oil and minerals, and to a lease thereof under the Leasing Act of February 25, 1920. That Act entitles the entryman, in the case of lands not withdrawn or classified as mineral at the time of entry, to a preference right to a permit and to a lease, if the entry has been patented with the mineral right reserved. The bill further alleged that the entryman entered upon the land as agricultural land and that it had not been withdrawn or classified as mineral at that time; that the entry was patented with a reservation of oil and gas to the United States. It was further alleged that one of the defendants wrongfully, and with knowledge of the petitioner's rights, had secured a permit to prospect for oil and gas on a tract which included the petitioner's land; that this was done without notice to the petitioner; and that the Pacific Western Oil Company had acquired from the permittee all his rights in the permit, and thereby procured a lease of the land with exclusive rights to drill and explore for oil on the land, and holds such lease in violation of the petitioner's prior and superior equitable right. An amendment to the bill made by stipulation included copies of the entry and the patent, both endorsed as "subject to the provisions and reservations of the Act of July 17, 1914."

The patent expressly reserves to the United States all oil and gas in the lands patented, as well as the right to prospect thereon. The Act of 1914 provides that lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, etc., shall be subject to entry, if otherwise available, under the non-mineral land laws, "with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified . . . together with the right to prospect for, mine, and remove the same" etc.

The stipulation included also a copy of an order of the President of December 30, 1910, withdrawing from settlement or entry lands including that involved here.

The respondents moved to dismiss the bill (1) for failure to state a cause of action; (2) on the ground that the United States was an indispensable party; and (3) on the ground of the petitioner's laches. The District Court denied the motion, heard the case on the merits, and after a hearing denied all relief to the petitioner. The Circuit Court of Appeals, without passing on the merits, ruled that the United States was an indispensable party, which could not be sued without its consent, and dismissed the case on the ground that it and the District Court were without jurisdiction.

On certiorari, the Supreme Court, in an opinion by MR. JUSTICE SUTHERLAND, took the view that the bill should have been dismissed for failure to state a cause of action. The opinion pointed out that, since the bill failed to state a cause of action, it was unnecessary to consider whether the Government was a necessary party.

"The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under § 20 of the Leasing Act of 1920, in virtue of his homestead entry in 1919 and patent in 1925. It appears, however, from the allegations of his bill and the exhibits attached, that the entry was subject to the provisions of the Act of July 17, 1914, among which is the limitation reserving to the United States all oil and minerals in the lands entered on account of which the lands so entered had been withdrawn or classified 'together with the right to prospect for, mine, and remove the same.' The lands here in question when entered were within the terms of the Executive order of 1910, by which order they were 'withdrawn from settlement, location, sale or entry, and reserved for classification . . .' Whether a 'classification' of the lands was effected by the order we need not determine since it is clear that they were 'withdrawn' by the definite and unambiguous words of the order; and, as shown by the bill, it is enough to exclude complainant from the privileges of the Act of 1920 that the lands were either withdrawn *or* classified. It follows that the motion to dismiss on the first ground stated was well taken and should have been granted and the case ended without a hearing, which the district court unnecessarily ordered—evidently out of abundance of caution.

"Since, plainly, the bill of complaint did not state a cause of action, the United States could have no interest in the case requiring its presence as a party; and the inquiry as to whether it was an indispensable party, which would have been entirely proper under a good bill, was here wholly gratuitous.

"The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. . . ."

The Court, after citing the authorities, took occasion to add, however, that courts of equity will endeavor to adjudicate a case on its merits where it can do so without prejudice to absent parties. As to this, MR. JUSTICE SUTHERLAND said:

"We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in. While the rule as stated is intended for the benefit of a plaintiff whose bill sets forth a cause of action which he should, if possible, be given an opportunity to prove, the principle it embodies applies with equal, if not greater, reason to a case like this where the bill entirely fails to do so. In such a case, the obvious reply of the court to a suggestion

that other parties are indispensable is that—since the bill states no cause of action against anyone, the rights of absent parties are in no way threatened by it, and to enter upon a consideration of the question of their indispensability would be a vain waste of time.

"If it be urged that the United States is an indispensable party and, hence, that the court may not proceed even to inquire whether the bill states a cause of action, the answer is that good sense suggests precisely the contrary. For a mere inspection of the bill at once discloses that it states no cause of action and, therefore, the United States is not an indispensable party, since it cannot be prejudiced by, and has no interest requiring protection in, a proceeding which at the threshhold is seen to be without substance. Nothing is to be gained by an inquiry into the status of absent parties when it is certain upon the face of complainant's bill that in no event will he be entitled to a decree in his favor.

"We are of opinion that the court of appeals should have disposed of the case in accordance with that view; and that the district court should have dismissed the bill upon the first ground stated in respondent's motion. Upon the question whether, upon a good bill, the United States would be an indispensable party, we deem it unnecessary to express an opinion."

The case was argued by Mr. Archibald B. Dorman for the petitioner and by Mr. Herbert W. Clark for the respondents.

Bankruptcy—Reorganization Under Section 77B—Dismissal of Proceedings

Under Section 77B of the Bankruptcy Act, a district court is empowered to dismiss the reorganization proceedings where the plan of reorganization is not confirmed because not found to be fair and feasible.

Upon a dismissal in such circumstances, a ruling on the constitutional validity of subsection (b) (5) of the Act is premature.

Tennessee Publishing Co. v. *American National Bank, et al.*, 81 Adv. Op. 54; 57 Sup. Ct. Rep 85.

This case arose under Section 77B of the Bankruptcy Act. The District Court dismissed the reorganization proceedings. The Circuit Court of Appeals affirmed on the grounds (1) that the debtor's plan was not a workable one and hence had not been presented in good faith within the meaning of the Act, and (2) that subsection (b) (5) of Section 77B, as applied to the adjustment of claims of non-assenting lien holders, was invalid under the due process clause of the Fifth Amendment.

The Circuit Court of Appeals, considering that the District Judge had been guided mainly by the debtor's honesty of purpose in passing on the issue of good faith, concluded that more was required, and that the statute contemplates the submission of a practicable plan with a reasonable prospect for rehabilitation of the debtor. The plan was found not to meet this test. The Circuit Court found, accordingly, that the finding of good faith by the District Court was erroneous in law, but affirmed the decree, since its result was thought correct, notwithstanding the process of reasoning leading to it. The Circuit Court also passed on the constitutional question, as stated above and held subsection (b) (5) invalid.

On certiorari, the decree was affirmed by the Supreme Court with an opinion by MR. CHIEF JUSTICE HUGHES. His opinion recites that the bankrupt had been in receivership more than two years prior to the reorganization proceedings; that an appraisal of its property showed assets worth about $295,000, while mortgage bonds and interest amounted to about $900,000, in addition to which there were $300,000 of unsecured claims. The District Court found also that none of the bondholders were willing to accept the plan, and that more than ⅔ of them and more than 50% of the unsecured creditors had affirmatively declined to accept it. It had also stated as to the plan (being the third plan proposed) that it would "manifestly be unjust to the bondholders" to undo what had been done in the equity case.

On this showing, the Supreme Court concluded that a ruling on the constitutional question was premature, and that it was unnecessary to determine the precise limits of "good faith," within the meaning of Section 77B. On these questions the opinion states:

"Although reaching the conclusion that the plan of reorganization was not a workable one and failed to meet the statutory test, the Court of Appeals proceeded to consider the constitutionality of sub-section (b)(5) and held it invalid. This ruling was premature. The constitutional question was not necessarily presented as with such a plan no case had been made for the application of sub-section (b)(5). It is a familiar rule that the court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it. . . .

"Nor do we need to inquire as to the precise limits of the concept of 'good faith' as required by Section 77B. Whatever these limits may be, the statute clearly contemplates the submission of a plan of reorganization which admits of being confirmed as *'fair and equitable'* and as *'feasible.'* However honest in its efforts the debtor may be, and however sincere its motives, the District Court is not bound to clog its docket with visionary or impracticable schemes for resuscitation. Sub-section (f) of Section 77B provides for the confirmation of a plan only if the District Judge is satisfied '(1) that it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible.' These are prime conditions. Unless the District Judge finds that the plan has these qualities he need go no further. Unless he so finds, he has no authority to proceed. There is no occasion for the District Judge to consider the constitutional validity of the application of the clauses of sub-section (b)(5) if the debtor's proposal is not found to be 'fair' and 'feasible.' It was the duty of the District Judge in this instance to consider the debtor's proposal in that aspect. He did not find that proposal to be fair and feasible. On the contrary, he deemed it to be unjust to the bondholders to overrice what had been accomplished in the equity case. He found that it was impracticable to determine the value of their bonds except by a public sale and, in view of the financial condition of the debtor, he deemed a sale of its property to be 'inevitable.' And along with these considerations, the proposal encountered what he described as the almost unanimous opposition of the secured creditors and the refusal of assent by a majority of the general creditors. Where the debtor's plan of reorganization is not confirmed the District Judge is authorized to dismiss the proceeding. Subsection (c)(8).

"The question before the Circuit Court of Appeals was whether, upon the record, the District Court erred in refusing to confirm the plans and in dismissing the proceeding. The Court of Appeals examined the debtor's last proposal as its ultimate effort to repel attack upon the feasibility of reorganization. The court found that the plan was not understandable in all of its phases, even after diligent effort 'to separate argument from concrete proposals' and 'to reconcile apparently conflicting clauses.' The provisions for a bond issue and for classes of preferred stock, out of the proceeds of which unsecured creditors and preferred stockholders were to be compensated, the court found to be 'wholly incomprehensible.' Certainly the District Court was not bound to consider such a plan as fair and feasible, or, in view of the situation which the record disclosed, to continue the proceeding.

"That was an entirely adequate ground for sustaining the decree of the District Court without attempting to determine the constitutional validity of sub-section (b) (5). Quite apart from that question, upon which we express no opinion, the decree of the Circuit Court of Appeals, affirming that of the District Court, should in turn be affirmed."

The case was argued by Mr. A. H. Roberts and Mr. Lewis S. Pope for the petitioner, and by Mr. Cecil Sims for the respondents.

Bankruptcy—Priority of Tax Claims Under §64b, Paragraph 6 of Bankruptcy Act

Under § 64b, paragraph 6, of the Bankruptcy Act, taxes owing to a state are of equal rank and priority with taxes owing to a city, and are not superior thereto, notwithstanding a provision of state law giving debts to the state priority in cases of insolvency, and the provisions of paragraph 7 of said section of the Bankruptcy Act giving priority to indebtedness to any person entitled thereto under state law.

Missouri v. *Ross, et al.*, 81 Adv. Op. 6; 57 Sup. Ct. Rep. 60.

In this opinion the Supreme Court disposed of a question as to the interpretation of § 64b, sub-division 6 of the Bankruptcy Act, concerning the priority of taxes owing by the bankrupt's estate to the State of Missouri, as against taxes owing to the City of St. Louis. The assets were insufficient to pay both, and the referee held that the claims were of equal rank, and should be paid pro rata to the extent of the available funds. The District Court and the Circuit Court of Appeals affirmed.

On certiorari, the decree was affirmed, in an opinion by MR. JUSTICE SUTHERLAND. In disposing of the question, the terms of § 64a were cited, which require payment of all taxes "legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof." Paragraph (b) prescribes the order of priority in which debts shall be paid in advance of payment of any dividend to creditors, the sixth class being "taxes payable under paragraph (a) hereof," and the seventh "debts owing to any person who by the laws of the States or the United States is entitled to priority."

Construing the sixth class as placing all taxes on a parity, MR. JUSTICE SUTHERLAND said:

"By this enumeration it is clear that Congress intended to establish seven distinct classes of indebtedness and establish their priority in respect of one another in the order set forth. When it came to the sixth paragraph, it embodied taxes payable under paragraph (a), there enumerated as taxes due the United States, state, county, district, or municipality. The intention clearly was to put these various governmental units in respect of their taxes in a single class upon terms of equality with one another. Since Congress was at pains to set forth the order of priority in distinct paragraphs under separate numerals, we are unable to reach any other conclusion. If it had been intended to establish priorities as among the governmental units named in the order in which they appear in the 6th paragraph, the very structure of § 64b plainly suggests that each would have appeared under a separate numeral instead of all being grouped under a single numeral."

The State also urged that it was entitled to priority by reason of the seventh class, since a statute of Missouri gives priority to debts owing to the State in cases of insolvency. But the Court was of opinion that the special provisions creating class six prevail over the general terms which would otherwise govern. As to this the opinion states:

"The state urges that the question is controlled by paragraph (7), which gives priority in the seventh degree to 'debts owing to any person who by the laws of the States . . . is entitled to priority.' Sec. 3152, Rev. Stat. Missouri, 1929, provides that in cases of insolvency, debts due the state shall be first satisfied, and that this priority shall extend to cases in which an act of bankruptcy is committed. The contention is that unpaid taxes constitute debts, and therefore fall within the seventh paragraph. But this conclusion must be rejected; for conceding that taxes are debts, they are carved out of the general provisions of paragraph (7) and put in a special class under paragraph (6), and thus fall within the rule that special provisions prevail over general ones which, in the absence of the especial provisions, would control." . . .

The case was submitted by Mr. Gilbert Lamb for the petitioner, and by Mr. Edgar H. Wayman for the respondents.

National Banks—Insolvency—Preferential Payments

Where a director of a national bank is also president and manager of a corporation, which is a depositor in the bank, and with knowledge of the insolvency of the bank, signed and forwarded for collection a check of the corporation which enabled the depositor to withdraw funds which stood to its credit with the insolvent bank, such action is a breach of duty, as director, under R. S. 5147, and the withdrawal is null and void as a preference over other creditors.

In such circumstances, both the depositor corporation and the director personally are jointly and severally liable.

Mechanics Universal Joint Co., et al. v *Culhane*, 81 Adv. Op. 25; 57 Sup. Ct. Rep. 81.

This case involved the interpretation and application of Section 5242 of the Revised Statutes which provides that payments made by a national bank "in contemplation" of the commission of an act of insolvency, with a view to the preference of one creditor to another, "shall be utterly null and void."

The suit here under review was brought by the receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, to recover, as such preference, the proceeds of a check for $42,761.12 drawn on the Bank by the Mechanics Universal Joint Company and paid to it. The Company denied that the Bank was then insolvent; that it was known by its directors and officers to be so; that they contemplated the imminent necessity for closing; and that the payment was made with a view to a preference. The District Court found for the plaintiff on these issues and decreed accordingly. The Circuit Court of Appeals affirmed, and on certiorari the Supreme Court again affirmed, in an opinion by MR. JUSTICE BRANDEIS.

The opinion first reviewed the findings from which it appeared that Ekstrom was president and manager of the Mechanics Company and was also a director of the Bank. He knew of its precarious position, and on June 12, 1931, had attended an informal directors' meeting at which the Bank Examiner had informed the directors and officers that there would be a run on the bank the following Monday, and that it could not stand a day's run. Shortly after this meeting Ekstrom signed the check in question, and caused it to be sent by mail for collection. It was paid the next day, Saturday, the 13th of June, through the clearing house, and at the close of business that day the Bank closed its doors, and did not reopen.

The Company contended that, even if Ekstrom's purpose was to get a preference for his company, the withdrawal was not unlawful. It argued (a) that Ekstrom acted not as a director of the Bank, but as an officer of the Company; (b) that he was not an employee of the Bank, or specifically authorized as a director to pay the check; (c) that the payment was but one of many on the day involved, in the ordinary course of business, and not in contemplation of an act of insolvency; (d) that the payment cannot be regarded as in contemplation of insolvency to prefer a creditor, since the check was paid, like others, in due course, without the intention of the Bank's officers to prefer a creditor; and (e) that the wrongful action,

if any, was Ekstrom's in using confidential knowledge for his Company's benefit, but such breach of duty of a director does not entitle the receiver to recover, because the liability is statutory, and does not provide that payments made to a depositor because of confidential information obtained as bank director shall be void.

In rejecting these contentions, MR. JUSTICE BRANDEIS pointed to the purpose of the statute to accomplish a just and equal distribution of assets among unsecured creditors, and to prevent preferences in contemplation of insolvency. He also emphasized that directors, in order not to defeat this purpose, are required to take an oath, under R. S. § 5147, that they "will not knowingly violate or willingly permit to be violated any of the provisions of this title."

In view of this purpose and the statutory duty of the directors, the Court concluded that the payment was within the scope of § 5242. As to the scope of the statute and the directors' duty, MR. JUSTICE BRANDEIS said:

"Ekstrom violated his oath and the duty under R. S. §5242 which is imposed, when he used knowledge of the bank's perilous condition, gained in his position of trust, to cause the withdrawal of funds by his Company, with a view to assuring it a preference over other depositors who lacked that knowledge.

"We have no occasion to decide whether a stranger would be liable as for a preference, if, without suggestion from any officer or employee of the bank, he withdrew his deposit because of rumor or suspicion of insolvency. It is true that ordinarily a payment made by a bank to a depositor in the usual course of business is not recoverable, even though the bank was then clearly insolvent. . . But the payment here in question was not made in the usual course of business; and the Company was not a stranger. Its president and manager was a director of the bank; as such acquired in confidence knowledge of its perilous condition; and, in violation of his statutory duty as director, used that knowledge for the purpose of preferring his Company. If the deposit withdrawn had been in Ekstrom's own name, he would, obviously, have been obliged to return it. The Company is in no better position. . . As it is liable under the statute, we have no occasion to decide whether it would be liable also on general principles of law or equity. . ."

The question of Ekstrom's personal liability was also raised. Holding that such liability was established, the Court said:

"Ekstrom was joined with the Company as co-defendant and was held liable with it, jointly and severally. For such personal liability there was ample basis. Knowing that the bank was in imminent danger of closing, it was Ekstrom's duty as director to conserve the assets for the benefit of all unsecured creditors—or specifically not to use that knowledge confidentially obtained to prefer his company. He depleted the assets by causing the preference to be given and thus violated the duty under R. S. § 5242, which he had sworn to perform. . ."

The case was argued by Mr. S. R. Kenworthy for the petitioner, and by Mr. Roy F. Hall and Mr. George P. Barse for the respondent.

Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Need for An Administrative Court

(*Continued from page* 859)

ment of justice in their relations with the Federal government consistent with the celerity of action and decision so necessary in the administration of such a great government as we have. The American Bar Association does not believe that we should follow a policy of drift or that we should shut our eyes to the great lessons of past governments—with their administrative branches becoming so overburdened as to result in dictatorships, whether Fascistic or Communistic. On the contrary, we believe that we should readjust our machinery of administration of justice at the hands of administrative officers within the framework of the Constitution, if that be at all possible, as intended by the men who started it to going; and that the time to do this rebuilding, to make the needed readjustments, is in a period of comparative tranquility rather than after the emergency has arisen. The American Bar Association has matched its belief with its deeds in this field of our Government and it is a program which should receive the intelligent and unselfish support of every lawyer in this land.

In closing, may I remind you that it is unfortunate, but nevertheless true, that the aggregate strength of organized minorities and selfish interests to which I have referred is sufficient to thwart or to emasculate badly needed administrative reforms. And this is true whether the administration, for the time being, be Democratic or Republican. We have the bureaucracies themselves, including both Civil Service and political appointees, guarding their prerogatives at every point of attack. There is the political party that happens to be out of power jealous of their opponent receiving credit for such reforms; there are the highly organized groups affected by the various administrative agencies who, for their own various selfish purposes, desire retention of the present methods, and, I regret to admit, even some practitioners before existing bodies who evidence a desire each to retain their own limited forum. Certainly the bar, as a whole, should lend every effort to overcome the combined influence of these selfish groups.

If our institutions are to endure, we must advance to the battle lines with the same degree of unselfishness as guided Washington and his men in making it possible for us to have a Constitutional form of government and that equal degree of unselfishness which has guided some few men at all times in our national history to make any personal sacrifices that our nation might endure. In doing so we must highly resolve that, come what may, needed readjustments in our governmental machinery and not catastrophes shall be our lot and that we will support men who are attempting to make the readjustments, as Hamilton or Madison said, to "New Model" the government machine within the basic principles of the Constitution, whether such men be statesmen or politicians, Democrats or Republicans. We cannot overload the administrative branch of the Federal government without destroying that equilibrium found necessary since recorded time to preserve a democratic form of government. I think it is only by so doing that we may even hope to avoid the inexorable cycle of government where such readjustments are not made in time. Above all, the ethos or spirit of our people must not be broken under the wheels of a vast bureaucratic Juggernaut.

THE LEGAL PROFESSION: ITS PLACE IN AMERICA

Faced with Growing Responsibilities, We May Appropriately Take Stock of Ourselves, Our Equipment and Our Accomplishments—Unmistakably American Lawyers Are Acquiring a Sense of Group Responsibility—Their Leadership Needed in the Fields of Substantive Law and Procedure—Background and Character and a General Education Superior to the Requirements of the Past Necessary for Leadership and Service Today—The Beginning of a New Day for the Profession*

By E. Smythe Gambrell
Chairman of Conference of Bar Association Delegates

THE persistent march of civilization and the amazing developments in all fields of human endeavor, are changing the outward aspects of society, and have made the life of the lawyer of today one of progressive experience and increasing responsibility. James Russell Lowell, in this city a hundred years ago, wrote:

"New times demand new measures and new men;
The old advances and in time outgrows
The laws that in our forefathers' day were best;
And doubtless after us some purer scheme will be
Shaped out by wiser men than we,
Made wiser by the steady growth of truth."

The things that are happening in the economic and social order should be and are reflected in the legal order. We who are heirs to the common law are coming more and more to realize that law is not the embodiment of inexorable scientific formulas, and to understand the words of another great Bostonian, Mr. Justice Holmes, who said a half century ago: "The life of the law has not been logic; it has been experience."

Law is a human institution, created by human agents to serve human ends. Ultimately, it must conform to the needs of the economic and social order,—not the economic and social order to its dogmatic demands. Law depends on social progress, and social progress, in a very real sense, depends upon the correct creation, interpretation and administration of law.

It is apparent that if the law fails to keep pace with the growth and development of society, injustices and hardships will follow. Mr. Justice Holmes, shortly before his death, declared:

"The law tries to embody things that men most believe and want, but the belief and wants begin as vague yearnings and only gradually work themselves into words. Those words at first cannot fully express what they aim at. Some of us have tried to make clearer what they are or should be, using history, economics and philosophy as our aids. If we have helped to throw light upon the general scheme of the subject or of some part of it, we have so far helped our fellows along a predestined road, and have been of use."

Speaking of the growing complexity of life, Elihu Root, in 1922, said:

"Somebody has got to solve these questions. How are they to be solved? I am sure all hope they will be solved by the application to the new conditions of the old principles of justice out of which grew our institutions. But to do that, you must have somebody who understands those principles, their history, their reason, their spirit, their capacity for extension, and their right application. Who is to have that? Who but the Bar?"

In a democracy the lawyer is the natural leader from whom and whose conduct the attitude of the community toward the law ought largely to be derived. His duty extends beyond his clients and to the public at large in the shaping of our polity. And he should be stirred by an enlightened self-interest, for the people will neither patronize nor endure a system of justice that is tardy, inefficient or insincere.

Faced with growing responsibilities we may appropriately take stock of ourselves, our equipment, and our accomplishments, although, as someone aptly has observed, "nothing requires greater heroism than to see one's own equation written out."

Our forefathers brought the English Common Law to the Colonies, but with it a love of freedom and a distinct aversion to the restraints imposed by then existing institutions. While at the beginning there were a few highly educated lawyers in America, the profession, for the most part, was made up of uneducated frontier individualists. Guild spirit and sense of group responsibility were lacking. There were no bar organizations, no self-imposed canons of ethics, no professional inhibitions. There was no bar in the sense of the term as used in England and Scotland and continental Europe. For more than two centuries the lawyers in America were merely an aggregation of individuals engaged in free money-making activity. This was in striking contrast with the organization of the profession in the country from which our legal institutions sprang. There the lawyers had practiced in an atmosphere of professional consciousness and pride, and were subject to rigorous requirements and restraints self-imposed in the three inns of court. While as individualists in a new land, without educational or other traditions, the lawyers played a large part in the establishment and protection of our institutions, they lacked group consciousness, group opinion, and group voice until more than a hundred years after the Declaration of Independence. Late in the 19th century this country began to emerge from frontier conditions and a frontier philosophy. Community life and a sense of community responsibility began to develop. In many cities and states the lawyers discovered they had interests in common. In 1878 there were fifteen state and local bar associations worthy of the name. In January of that year Simeon E. Baldwin launched a movement in the Connecticut Bar Association to bring about a national association of the legal profession. As a result of his suggestion, seventy-five lawyers from all parts of the country assembled at Saratoga Springs, New York, on August 21st, and formed the American Bar Associa-

*Annual address, as Chairman of Conference of Bar Association Delegates, American Bar Association, Boston, Mass., Aug. 25th, 1936.

tion. Two hundred ninety-one members were enrolled before the adjournment of that first gathering. During the fifty-eight years that have elapsed since its organization the Association has grown in direct membership to approximately 30,000 lawyers and has developed a program of leadership and service through committees and sections devoted to research, wholesome propaganda, and other professional activities. The members are carrying on this program at an annual expense of more than $200,000.00 and through unlimited voluntary work.

Unmistakably, the American lawyers are acquiring a sense of group responsibility. Many circumstances have aided in this development, notably the Association's annual meeting held in London in 1924, at which time the lawyers and judges of the two great Common Law countries mingled in an atmosphere of cordial friendship and fraternity. There the Americans caught a conception of the lawyer's life and work in England and, to a lesser extent in other European countries,—and discovered that the Old World lawyers were accustomed to closer associations than we knew, and that these contributed to their enjoyment of life, to their culture and to their value to society.

During its history of more than half a century the American Bar Association has much to its credit. It early advocated higher educational and moral standards for admission to the bar, and its recommendations have been adopted by more than half of the states. It has been the chief sponsor of a successful movement for the uniformity of state legislation in certain fields, and more recently has aided the American Law Institute in the simplification and clarification of American common law. It conceived the need of reform in the administration of the law and has led the movement for the establishment of judicial councils throughout the Union. It has insisted that the courts themselves are best qualified to formulate the rules of court procedure, and points with pride to the Act of Congress, approved June 19, 1934, authorizing the Supreme Court of the United States to prescribe unified rules of practice in causes at law and in equity in the Federal courts. The Association has stimulated a healthy interest in the improvement of methods for the selection of judges; has maintained that ours is a profession and not a trade, and has opposed the encroachment of lay individuals and corporations that in this commercial age are attempting to reduce the standards and conceptions of personal responsibility in the profession to the plane of ordinary business in the market place. It has worked constantly for cooperation between the press and the bar, and for a more wholesome public interpretation of our legal institutions and the administration of justice. It has encouraged the formation and strengthening of state and local bar associations, which now number approximately fifteen hundred. Recognizing the injustice of the public's holding the bar responsible for abuses and at the same time not giving the bar authority to correct them, the Association conceived and has in many states successfully promoted the incorporation of State bars, with authority in them to prescribe and enforce professional standards, and, as instruments of government, to formulate and carry out a program in keeping with the highest ideals of the profession. At no time or place in history have there been so many agencies so earnestly or unselfishly engaged in the enterprise of improving the law and its administration as at the present time in the United States. We may congratulate ourselves on what has been achieved under the aegis of the Association to date.

Undoubtedly the Association's greatest achievement has been the taking of more than 100,000 individualist lawyers of this country and converting them into a legal profession in the true sense of the term—an all inclusive group that is possessed of an ideal and a code of ethics,—that is informed, that has a well-reasoned opinion and a voice to express it, and the authority that derives from the dedication of these to the common good. Yesterday the American Bar Association brought to happy consummation the movement for a representative national bar organization, in which many great leaders have had a part. We sounded the note of cooperation, not simply as lawyers, but as associations of lawyers. The Association now speaks as the accredited voice of the united bar of America.

But it would be a mistake to regard yesterday's achievement as the perfection of bar organization in this country or as an end in itself. In the words of Shakespeare, "What is past is prologue." The growth of law and of legal service must be as unceasing as life itself. There will always be problems to challenge the legal profession—work for it to do. Justice Cardozo charmingly has said:

"The inn that shelters for the night is not the journey's end; the law, like the traveler, must be ready for the morrow. It must have a principle of growth."

Where are we aiming? Where are we going? We recognize the need for continuing improvement of law and its administration. We have said that we wish the entire bar to have a voice—a commanding voice; that we desire an organized and concentrated influence; that we desire to improve the tone of the bar, to stiffen its self-respect, to secure a wider acceptance of professional standards.

In the field of substantive law our leadership is needed in the perfection and application of statutes to encourage industrial and commercial cooperation and at the same time protect against monopoly; to maintain the proper relationship between capital and labor; to raise revenue; to regulate public service organizations: to promote safety, morals, health, and the general welfare; and the working out of countless other adaptations of law to meet the changes in our social and economic life. The development of our country in many respects, has outrun the laws.

We cannot longer face with complacence the demands for state court procedural reform, expecting economic and social relations to adjust themselves to a technique that denies justice by delaying it. Too frequently we have preserved the absurdities, as well as the excellencies, of the procedure which has been bequeathed us and have failed to make it responsive to the needs of the practical age in which we live. We have been and are affected with an easy tolerance of ancient evils, regarding them as sacred because rooted in the past.

It is difficult to believe that in many states in this enlightened age, men sentenced to death have been denied judicial review, because, although the record was eloquent with objections carefully noted and passed upon by the trial judge, the bill of exceptions failed to do homage to the verbal fetish, "Exception." Ill does it become us to smile derisively at the now discarded superstitions of primitive peoples and at the same time accept as inevitable the relics of their legal procedure.

Jury trials, in many situations, have outlived their usefulness. The requirement of unanimous verdicts in civil cases can hardly be justified. Distinctions between law and equity courts and their procedure should be abolished. Litigation is so hedged about with expense and delay that people in large numbers are seeking to settle their controversies by the administrative method in order to avoid the lawyer and his forum.

Happily, inquiry into the operation and effect of

laws is being substituted for faith in their fixity. The ends and consequences of legal institutions are becoming the dominant interest. Modern learning is teaching us to put everything to the test, even though thereby our respect for some traditions may be impaired. And no one ought to complain if a practice, an institution or a concept in our profession is called upon to justify its continued existence. Chief Justice Hughes, in speaking of the preparation of the new rules of Federal practice, said:

"It is manifest that the goal we seek is simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits, with a minimum of procedural encumbrances.

"We should not be fettered by being compelled to maintain the historic separation of legal and equity procedure."

Let us hope that the new Federal rules will serve as a model for State procedural reform. In many States there is need of a well-organized Department of Justice. All States ought to have coordinated judicial administration under the supervision of their Supreme Courts; and the judges ought to be empowered to function as ministers of justice, and not merely as referees. Much remains to be done in the field of criminal procedure, and particularly in connection with juvenile delinquency and prison administration.

If the lawyer is to supply the leadership and render the service that is demanded in a changing and increasingly bewildering world, manifestly he must have background and character and a general education superior to the requirements of the past. We need more than ever an adequate philosophy of law. The American law school of the present day is unequalled in imparting technical knowledge. But since law is, or should be, an outgrowth of life in all its phases, it would seem that we should place greater emphasis on culture and the breadth of human understanding. We must inculcate in the candidate for admission to the bar a sense of the peculiar responsibility of his position. He must appreciate the public aspects of a lawyer's career. He must know more of history, of government, and of science, and he must be familiar with our literature and our ideals. He must know that law is more than a collection of doctrines. He must from time to time lift his eyes from law books and look out the window on the world he seeks to serve.

The legendary right of every American boy and girl to enter the legal profession must be qualified by a consideration of the public's right to competent and honorable service and to protection from the uneducated and unethical practitioner. We still have the difficulty of the traditional preoccupation of the abler men at the bar—men who, happily in increasing numbers, are beginning to think of their profession and its public obligations and to do for it the kind of work they have always done for their clients. We must organize not only the best lawyers, but also those at the bottom who, in many instances, have failed to affiliate with any bar organization because unwilling to accept organization standards and obligations. Every lawyer who is worthy to practice law—to hold his professional license—ought to be a member of the organized bar. Our profession cannot honorably take the position that the unsuspecting public shall be permitted or encouraged to commit its law business to licensed lawyers with whom we cannot afford to be associated. To say that a lawyer is unworthy of membership in a bar association ought to imply that he is unworthy to further hold his license or to enjoy the trust and confidence of clients.

In our mobilization of the profession let us not overlook the importance of maintaining in full vigor our State and local associations, which are rooted in local sentiment, and to some of which are attached the most precious traditions of service and fellowship. We cannot accomplish what we seek without the strengthening influence of intimate personal relationship. We need the intensive work of local groups, and we need the cooperation of all associations, to speak with the authority of the entire bar. The national body will hardly be more robust than are the State and local bar associations whose chosen representatives it brings together.

But improving substantive and adjective law and the bar and bar organization is not enough. To attain that goal of social good order, which is the real objective, we must strive for a technique whereby the promulgated rule may function effectively as a social force. Even the most perfect laws are not self-executing. The reforms they embody will be meaningless without this technique. Too frequently in times past we of the profession have assumed that we could discharge our duties of leadership by the perfection of legal doctrine. Good administration is largely a matter of skill and spirit, rather than number and complexity of the rules which are provided. While the legal profession, by reason of its training, experience and exclusive license, is specially charged with the duty of leadership in maintaining, improving and administering a system of justice, it may be said that all our institutions spring from the people, and that the people, in the long run, will have the kind of justice they deserve. In the triangle of the administration of justice, the bench and the bar have peculiar responsibilities, but the base of the triangle is the public. All three have obligations, and all should observe codes of ethics.

Since law improvement cannot rise above popular respect for law and the agencies that enforce it, it is of paramount importance that our legal institutions and their functioning should be fairly and intelligently interpreted to the people. We cannot hope to secure popular respect for the law or its administration when the rights of litigants frequently are determined by sensational newspaper trials in advance of or during trials by constituted authority. Until the public sees in the trial of a case something more than a display of forensic skill and recognizes that it has an interest in right's prevailing in every instance, the struggle for a better administration of justice will be discouraging. Our profession may well urge upon journalism, as a matter of self-interest as well as of public duty, the importance of fair and accurate reporting of the functioning of our legal institutions, for in them freedom of the press has its only safeguard. If democracy is to be a real and living thing, the citizens who share the responsibility of governing—all citizens—ought to have access to information upon public affairs which is accurate and adequate.

I verily believe we are at the beginning of a new day for the legal profession in this country. Let us rededicate ourselves to service in keeping with its best traditions. Our first charge, our abiding obligation, concerns the promotion of justice, and our greatest happiness should be found in the fellowship and cooperation of those engaged in the task of safeguarding and improving it. The force which binds us as members of separate bars of distant states is our common devotion to a great cause. Here amidst the shrines of American law and culture and in the glow of mutual encouragement we are enabled to recapture the enthusiasm of our high calling and to rekindle the ideals which must continue to guide us in the performance of our duty.

HOW AND WHERE TO BEGIN PRACTICE OF THE LAW

Responsibility of the Bar to Aid the Young Lawyer Who Is Just Entering the Profession—Where to Locate Is an All-Important Question—Advantages and Disadvantages of Locating in Communities of Different Sizes

By Del B. Salmon
Member of the Schenectady, N. Y., Bar

THE Bar has a responsibility to the young man entering the practice of law; this responsibility should begin before the young attorney actually engages upon his career. Every year, hundreds of young men are completing their studies for the bar and there arises the all-important question as to how and where they shall begin practice. Very little, if anything, is found to aid or guide the inquiring student. Volumes have been written upon legal subjects and more volumes have been written on legal ethics, all of which is valuable, but it has no value unless the attorney beginning practice has some one for whom and upon whom he can practice. The study of law is difficult, but it can be mastered; the building of a law practice is more difficult and is not always mastered. Many able young men become discouraged and fall by the wayside from which they may see those of less ability, and more courage succeed. More than occasionally their discontinuance of the law would have been avoided had they possessed some knowledge of the general principles which experience has proven governs the future of a lawyer's career.

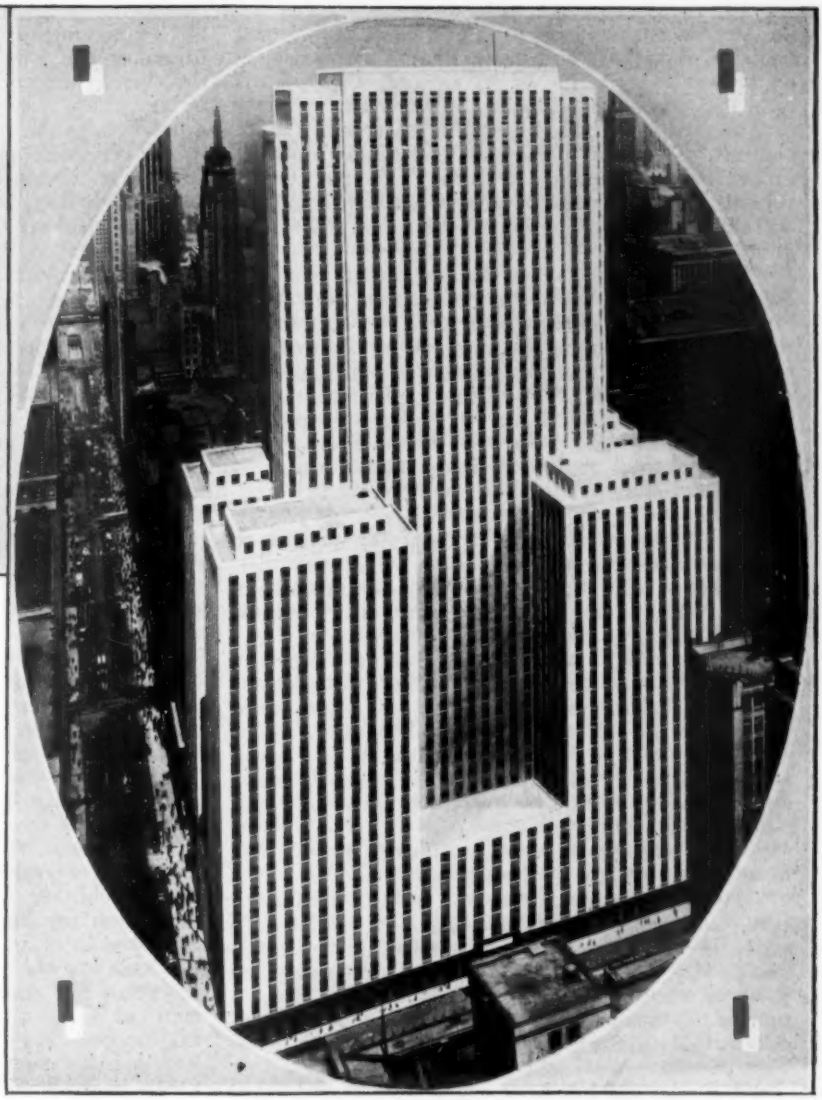
There was a day when the student was a part of a law office. He may then have come to the bar with less book knowledge, but he had actual experience as to what went on inside a law office. He had first-hand knowledge and with it he started to build his own career. Some of our ablest lawyers were the products of the old style law office handling a general practice. Such offices are fast passing; most of their students never attended law school; few ever attended college. They had seen the practical side of the profession in an office manned by capable lawyers who had attended neither colleges nor law schools. This is not an argument for lowering the educational requirements of the profession. It is simply a comment as to why the students of the early days were able to succeed in practice.

Few older attorneys are today willing to accept the responsibility of advising the younger generation upon the subject in hand; they feel that by so doing they are either setting themselves up as examples of what to do or what not to do. The writer does neither—he simply takes the liberty of recording experience and observation for the consideration of those who seek information. There is no desire to impress the views expressed upon young attorneys or any one else as exclusive or correct.

That there can be no absolutely correct and certain conclusion as to how or where any young man should begin practice is obvious. Much depends upon his energy and desire to work, his adaptability, his connections, his financial resources, physical condition and health, temperament and the other factors of life. It is all a relative matter. Success to one may be financial independence, even if gained at the price of health or reputation or both; to another it may mean a quiet life free from anxiety and worry with just a comfortable living. And to others it may mean something different.

When it is all said and done, conclusions reached after observation are but a one man opinion which may or may not prove of value to the beginner. It must be borne in mind that in the practical application of any suggestions, the qualities of the individual must have first consideration.

It goes without saying that the young attorney should take great care in selecting the location in which he intends to establish himself in practice. The great majority of attorneys never change locations; if they do, it is in the early years of their practice. As a general rule the attorney ends practice where he begins. When he commences, there is no occasion to move until after he sees what he can do in his chosen locaion. When business begins to find his doorstep he hesitates to change locations, feeling that he may do less elsewhere. Consequently he continues where he began and as a rule ten years of practice finds him married and settled down. He ceases then to be a young lawyer; he sees younger men, new names and new faces and realizes that life is traveling its steady pace and that he is just one of an endless procession. It is then that he should feel somewhat established and, in fact, he is. Family ties and obligations add to the difficulties of changing locations. The ability to make a living for his family and him-



Top: Lawyer's Office in the Arcadian City of Crawfordsville, Ind.

Upper Left: Court House in Crawfordsville, Indiana

Right: The Field Building, Chicago, Illinois, which houses many legal firms.

self in one location is usually sufficient reason for not moving to another. Therefore the necessity of a wise choice of location at the outset is demonstrated. It is one of the most important choices of the young lawyer's life and not infrequently is made upon insufficient factual information and little investigation. The writer timidly enters this unexplored field with the hope that something of value may be accomplished.

In the first place, no young man should locate for practice without abundant knowledge of the site, its location, the territory from which it draws, the amount of business available to attorneys, the calibre of the bar and the opportunities to make a living and to live. For those insistent upon locating in one of the large centers, there are other problems. But assuming that the young attorney has no connections available in a large city and does not desire to try his hand at breaking into the ranks of the vast horde of struggling attorneys in the great centers, his attention is then turned to the smaller cities, towns and villages. What general principles can be laid down that will be of assistance to the young man seeking a location?

Experience and observation show that Capital cities and County Seats are preferable to other locations.

That an industrial or shop town is more affected by business conditions than other places. That the fewer the industries in a given town, the poorer place it is for an attorney to locate. One industry towns may reach heights in the way of active business of small calibre in days of prosperity; in times of depression they furnish the lawyer with the business that accompanies the soup house and the bread line.

There are more lawyers per capita in cities than in the smaller places; the larger the city the more lawyers per capita. It is true that cities which are located with large surrounding territory attract legal business from a distance by virtue of size, custom and location. Such cities often become the centers for legal work to the detriment of attorneys located in smaller places within 30 or 40 miles.

Not until the last few years has there been anything in the way of statistics to guide attorneys as to what was actually taking place in the profession. Business was progressing at a rapid rate until

the depression; it had its trade associations, and trade organizations with facts, figures and statistics on almost every angle of its requirements. Business had complete statistical information and records freely disseminated by trade journals and associations. The legal profession had almost nothing in the way of statistical records. The law schools turned out thousands of young men who gained entrance to the bar without a scrap of records to guide their future.

About two years ago the commission on the Administration of Justice in the State of New York issued various reports, which were the first actual records of the kind in the state. They showed the profession which way the wind was blowing. The reports showed that 81% of the total issues of law and 89% of the total issues at equity were concentrated in the 14 urban counties of the State. That 84% of the total negligence issues at law and 90% of the total domestic relations issues in equity were located in the urban counties.

"That the percentage of the total number of issues at law in the urban counties which were disposed of by trial, was greater than the percentage of the total number of such issues in the rural counties disposed of by trial."

"That about one-tenth (9%) of all domestic relations issues in equity were marked off the calendar in the urban counties whereas one-fourth were marked off the calendar in the rural counties. About one-third (36%) of the domestic relations issues were disposed of by inquest in the urban counties and one-eighth (13%) by inquest in the rural counties."

That negligence issues comprised nearly 75% of all issues at law in the state.

It therefore seems that the bulk of trial work is in the urban counties; also that 75% of trial work today in the Supreme Court consists of negligence cases. Of the cases tried, 75% of the negligence issues are automobile cases. This means that automobile negligence cases constitute over 56% of all cases tried in the Supreme Court of the State of New York.

No mention has been made of criminal cases which as a rule, are not desirable. An occasional criminal case may bring the young attorney to public notice, but generally speaking, they lead nowhere. They often consist of fake situations, fake defenses and fake alibis, but of course, not always. The attorneys specializing in criminal practice become entirely disassociated from the attorneys handling civil matters. Once in a while lawyers handling civil business may have a criminal case for a regular client, but as a general proposition, civil and criminal practice are divergent.

The criminal lawyer does not like the detail connected with civil business; the civil lawyer does not like the associations accompanying criminal practice.

In the selection of a location the question of criminal business should not be considered; experience will teach the young attorney that it is undesirable practice, and is generally so regarded by older attorneys. There are, however, exceptions to the rule but they are few and far between. Few attorneys ever build a successful practice based on criminal work; many build a successful practice based on civil work.

In making this presentation, the subject of the future of the young attorney is being confined to the average attorney in general practice. Today, as never before, avenues are open to the person with a legal education in service of the Government and in the offices of public utility, railroad and industrial corporations, and insurance companies.

This branch of legal work is more than often of the clerical type, excepting to the few at the top. The attorney at the head of the legal department of a great corporation is very often a vice-president of the company, being designated as the vice-president in charge of the Law Department. He may have a department of five or fifty junior attorneys, none or few of whom have ever tried a law suit; they are, as a rule, all cogs in the machinery of big business. They work in the confines of their own particular line and have little or no contact with the outside or attorneys in general practice. They are sure of a living; they do not feel the ups and downs of winning or losing cases. The thrill of personal accomplishment is not theirs; they are simply one of a well organized law department. As time passes, they feel the certainty of their position; it is less precarious than that of the lawyer in general practice. Such attorneys hope for and receive increases in salaries and finally retirement with a pension. They have lived in the profession but in reality they have never known the thrill of active practice and bitterly contested litigation. With them, it has all been impersonal and a day of fixed hours. The lawyer in active general practice has no stated hours. He may be called at night to draw a will—or else burn the midnight oil running down citations to present to the Court in the midst of a trial, or else go over his case with witnesses in the evening. While he may of necessity become irregular in his working hours, he maintains his independence and freedom of action. To some attorneys this compensates for the hard work of an active general practice. The young man trained in the law department of a big corporation soon unfits himself for active general practice. The active practicing lawyer is, on the other hand, rarely fitted to become a cog in the law department of a big corporation. Here again are two roads, either of which may be followed—the young man entering practice, knowing his own desires, temperament and capabilities, may have his choice.

There is also the young attorney who enters government service in work of a quasi-legal nature. Such positions are largely of a clerical nature with the certainty of a livelihood and the eventual retirement and pension.

Then again, we find attorneys in the Home Offices of insurance companies, casualty, indemnity, fire, health and accident, and life, and other attorneys in the branch offices of some of these lines. The attorney having the designation of General Counsel usually has worked through the ranks of his highly specialized line and has the law on his particular branch at his fingers' end. His assistants are following in his footsteps, junior in years and less experienced. In some insurance lines, branch offices have attorneys in charge. This is especially true in casualty and indemnity lines, where the principal work is in the investigation and adjustment of claims. This, too, is a highly specialized line dealing with negligence, automobile and public

liability, also actions on bonds and on policies and workmen's compensation. These items are all set forth for consideration of the young attorney. Time does not permit a detailed or complete statement of the duties and responsibilities of the attorney employed by an insurance company. In all classes of legal work, there are trying and disagreeable features; an attorney employed by an insurance company is sure of his compensation. He is working for a responsible concern, the same as one employed by a public utility, industrial corporation or a railroad.

There are other salaried positions open to young attorneys, but mention has been made of the principal lines.

So far, treatment has been given to salaried positions insuring a livelihood and opportunity for those who are able to advance by hard work and ability. This field is limited in absorbing the great number of attorneys, beside the open field of general practice.

General practice is so varied, depending upon location and hundreds of other circumstances, that it can only be approached with care and caution. No living person can formulate any more than broad conclusions of experience. The lawyer in a village of several thousand inhabitants has a much different experience from that of the lawyer in a city of 100,000, though both are in general practice and actively engaged.

The small town lawyer is under small expense; the city lawyer is under heavy expense. The small town lawyer can work in a leisurely way and make a living; the city lawyer working at the same pace would die of starvation.

The able and responsible small town lawyer is an important part of his community and the surrounding territory. He knows everybody and everybody knows him; he becomes a leader in local affairs. The citizens of the town seek his advice and counsel; he is with them from the cradle to the grave.

The lawyer in a city has a limited acquaintance; he is soon traveling in a groove, surrounded by established competitors. Each year he faces greater competition by virtue of the influx of many young attorneys who are striving for a foothold in the cities.

The small town lawyer is known to all in his neighborhood; his clients and prospective clients will wait for him; they are not pressed for time. The clients and prospective clients of the city lawyer will not wait for him; they are pressed for time and instead of waiting, may enter the open door of one of the dozens of law offices in the same building or the building across the street. The atmosphere surrounding practice in a village differs entirely from that in a city. Leisure and ease pervade in the small places; noise, hurry and bustle are all part of life in the city. The same difference in atmosphere prevails in the law offices of places, big and small; the bigger the place, the faster the pace required of the successful lawyer. Such being the case, every young man should decide for himself how fast he is capable of moving, how hard he is willing to work, the amount of physical and mental strain that he can bear, his temperament and ability, and how leisurely a life he wants to live.

If he wants leisure and an easy going life, he should locate in a village, preferably a County Seat. If he wants hustle and strain and strife, and is physically and mentally able to bear the burden, he should choose a city or the larger centers of population. The heights of the big city are harder to climb but when reached, they surpass the financial rewards that can be attained in smaller places. But with the success attained in reaching the heights, comes the responsibilities which are necessarily attendant. These are general conclusions only; it is incumbent upon each young attorney entering practice to make his own choice. Here again, only the way can be pointed—the choice is individual and personal.

Recent years have seen a great horde of young attorneys locating in cities of 50,000 and upwards in population. This is in part due to the fact that most law schools are located in such cities and many residents study at their local law school and begin practice in their home city. The result is that there are several times more lawyers than necessary to care for the legal business at hand; in other words, there isn't business enough to go around.

While the young attorneys are flooding the cities just the reverse situation prevails in the villages and smaller cities. Villages and small towns, as a rule, have fewer lawyers in practice today than they did thirty years ago. This is especally true of places which are remote from larger cities and of villages in the farming districts. The places referred to gain less by boom times and lose less by depression days than larger places or industrial centers. They suffer neither from the aftermath of business or industrial booms; they run on a more even keel. In fact, the smaller places have been overlooked by young men wishing to establish themselves in practice. Small towns and villages have no daily paper to ballyhoo their virtues and no service clubs to take their business people away from minding their own affairs. They do not boast of a Chamber of Commerce or a Board of Trade; in the midst of the whirl of propaganda and ballyhoo, they go on complacently and prosper. The able and energetic young attorney should not overlook the opportunities which such places offer.

Young men are too quick to pass over the possibilities offered in the smaller places and too eager to locate in cities and large centers for want of deliberation and factual investigation. They drive through a prosperous village and see only the road signs. Not unlikely, the ablest and most prosperous lawyer in the county lives and practices there. He is within easy reach of the city in these days of good roads and fast moving automobiles. He enjoys the benefits of the electrical age and its appliances in his home and office. He can take time off for golf, fishing, hunting, a week end trip, or what not. His clients move slowly: they do not have the impatience of city clients. The wait of a day or so does not upset them. They are engaged in legitimate business; they spend slowly because they earn slowly. In hundreds of our towns and villages are to be found able and prosperous lawyers who serve the community well. They have always been an asset to the profession.

Another angle of the subject under discussion worthy of consideration deals with the advisability

of the young attorney commencing practice in his home town or city. To properly answer this, the first consideration is whether he can enter an office at home which has been established by his father or brother, or some close relative or friend. If he can do this and there is sufficient business in the office to support him or to which he can eventually succeed, the answer is in the affirmative. If his father's office offers no opportunity in the reasonably near future, his prospects are better in a strange place. This, of course, is subject to the limitation of individual ability and the qualities required to start on his own among strangers.

Assuming that the young man completing the law has no office such as is referred to, offering him an opportunity, in that event he has to start on his own. In such a case, after he has a working knowledge of practice, he will find it to his advantage to build from the bottom in a place remote from his home town or city. This may not always apply to the young man reared in one of the large centers of population; in my judgment it does apply in other cases.

A young attorney can go to a strange place at an early age and make contacts which will be of more business value than those he has in his home town. He can do things in a strange place that he could not or would not do in his home town. As a stranger, he starts at scratch; he has no ties or obligations to limit his contacts, business or social. Every one looks alike to him, in fact, they are all strangers, taken at face value. In a social way, he is not limited or prescribed by his family connections; the same applies politically and in a business way. In a strange place, he has no prejudices, inherited or otherwise. He has no drawbacks and can mingle with all upon equal terms. He is simply a young lawyer eager to succeed and the smaller the place the greater is the desire of the people to help him.

Contacts will come in a hundred ways — the church, the political club, the lodge, the boarding house or hotel and business men with eligible daughters. And in due time if he possesses ability, integrity and a desire to work and succeed, he will find his place in the community and prosper.

The greatest adventure of life lies before the young attorney who enters practice in a strange location. He enters a new world and matches himself against it. The opportunity to make good is his; it stares him in the face as a challenge. The young lawyer made of the right stuff, with plenty of will power and determination, ability and good health is sure to succeed. No young lawyer should expect to find that the establishment of a law practice is a bed of roses entered through an arbor of orange blossoms. It is more apt to be an uphill sandy road with byways of thorns and thistles—but up that road many have laboriously travelled and found a comfortable and independent life. The open country and broad spaces where one may enjoy life with satisfaction lie ahead of the young lawyer and are capable of conquest—not by spasmodic labor, but by steady day to day work, well and honestly done. From this vantage point the successful lawyer can diagnose the reason why many try and fail—and why the few succeed. The law is a glorious profession when honestly and legitimately practiced; it allows a certain liberty and freedom of action that is present in few other professions.

Our young lawyers should enter practice expecting to succeed. In spite of all that has been written to the contrary, no one has a monopoly in the field of legal practice. The road to success is straight and clear for the young practitioner who is willing to assume the burdens and responsibilities requisite to success. Many older lawyers would like to join youth in this great adventure; it is well worth every ounce of the courage and energy and labor required.

And as a final word to those entering upon their career, attention is directed to the opportunities offered in the small towns and villages of this great country. Do not pass them by lightly—they have given our nation many of its ablest lawyers and statesmen.

Current Problems of Law of Communications

(*Continued from page* 852)

Industrial Recovery Act and the Agricultural Adjustment Act.

The problems raised by the license system as a method of regulation deserve to be studied as a whole, without loss of perspective due to overemphasis on a small segment. Their importance is obvious, in view of the marked tendency of our State and Federal Governments to use the license system as the method of regulation and to impose it on one business after another. The problems force us to realize how inadequate has been the study of the actual operation of the system, its advantages and disadvantages, its merits and its dangers. It is unnecessary to tell you that erroneous, unsound and dangerous principles of law developed under the operation of a license system administered by one agency will spread to the others like an epidemic. There is no development in administrative law, in my opinion, that threatens a more profound revolution in the relations between government and subject than does the license system, and while radio is only one of many fields subjected to it, it is the most conspicuous and among those requiring the greatest vigilance.

There are times when lawyers can not be blamed if they sigh for a breathing-spell in the advance of science. At the moment, signs of such a breathing-spell are not particularly numerous or encouraging; in fact, so far as radio is concerned, acceleration of pace seems to be the order of the day. After all, however, if we can maintain a perspective, keep a foothold on the lessons of the past, not be swept off our feet by the progress of invention, and avoid being deluded into thinking that every novel fact calls for a new rule of law, we can contribute greatly to a sound and enduring jurisprudence.

Binder for Journal

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

AMERICAN Foreign Policy in the Post-War Years, by F. H. Simonds, 1935, Baltimore: The Johns Hopkins Press. Pp. 160.—This is undoubtedly the best survey of our international relations since 1920 which has yet appeared—or is likely to be presented in a similar space. Mr. Simonds' unique personal knowledge of events and personalities here and abroad equipped him, as many of his books about the peace settlements had already abundantly indicated, to undertake this synthesis. These Albert Shaw Lectures at the Johns Hopkins University are a brilliant climax to his distinguished career as correspondent and author.

He treats successively of the economic aspect of our foreign relations (war debts and reparations, foreign loans and trade), world peace, security, disarmament. In two final chapters he sums up the political aspects of the period "from Wilson to Roosevelt" and treats of "the future." His prescriptions are for a nationalist policy—nationalist in the sense of a foreign policy that would emphasize domestic self-sufficiency and non-interference in economic or political policies of other countries. However one may disagree with the proposals he suggests, his diagnosis of the dilemmas and contradictions of our own policy during the past fifteen years is as inescapable as it is acute. Whatever our future policy may be, it will rest on surer premises if it is based on a recognition of the factors Mr. Simonds has here explored with relentless logic and persuasive lucidity.

Amherst College. PHILLIPS BRADLEY.

State Interests in American Treaties, by N. P. Mitchell. 1936. Richmond, Va.: Garrett and Massie. Pp. x, 220.—The field covered by this volume is one of the least treated in our constitutional law. The author has explored a large part of its area, utilizing the great variety of records in the State Department as the principal source of his materials. His discussion divides into two main groups the state "interests" affected by the treaty-making function of the national government: those which may incidentally be limited by the exercise of superior national powers in such concerns as boundaries and frontiers, boundary waters, consular relations, and extradition; and those which are directly curtailed by the terms of treaties, such as commerce and naturalization, and administrative and police power matters.

It is in the latter field that any real question can arise of what the phrase "under the authority of the United States" when used with respect to treaties as the supreme law of the land intends. Is the treaty-making power limited by the undefined reserve powers of the states under the 10th amendment? The author, a Southerner, not unnaturally leans to a broad interpretation of the 10th amendment; he even goes so far as to speak (p. 7) of powers "forbidden to the national government." Much controversy has raged about this question in other fields; as to the treaty-making power it has been postponed if not eliminated in the classic words of Mr. Justice Holmes in *Missouri v. Holland* (252 U. S. 416) by his assertion that the power was not limited by any "invisible radiation" from that amendment.

It would have been interesting, too, in the light of the exhaustive survey which Dr. Mitchell has made, to have had some discussion of the effects upon state interests of American participation—even to the extent of ratification of conventions—in the International Labor Organization. But he has treated the past so adequately that it is no detraction from the value and merit of his study that he did not trace into the future the lines which he has here charted. Their main directions are clear: the treaty-making power of the national government is not only broad enough to include the necessary functions of the national government, but is in fact a centripetal force in our federal system. The national government utilizes—and so preserves—a wide range of state law and administration in the application of treaties regarding the personal and property rights of aliens and other matters; the states are the agents of the national government in this enforcement.

PHILLIPS BRADLEY.

Amherst College.

The Assyrian Laws: A Translation and Commentary. By G. R. Driver and John C. Miles. New York: Oxford University Press, 1935. XXIV + 534 pages.—The most important Assyrian legal material is contained in the so-called Middle Assyrian Laws, unearthed by the Germans at the city of Asshur and published in 1920-21. The present volume is the first attempt to present in English a comprehensive publication of Assyrian legal material together with a complete apparatus of interpretation.

The title "Assyrian Laws" must not be taken too literally. The first two pages, comprising "Old Assyrian Laws," are not really laws at all, but descriptions of court procedure. The majority of what remains cannot be regarded as part of a code, much less of a state code. Tablet A consists of 59 enactments covering offenses by or against women, for the most part married women. Tablet B originally contained 20 laws dealing with real estate, but a fifth of these are now illegible. Tablet C covered 11 enactments dealing with debt and personal property, including human chattels. A third of these are too badly damaged to permit restoration.

The total amount of primary material is accordingly very limited and it is not surprising therefore to find that the "legal commentary" of 356 pages makes up the bulk of the book.

The formulation of laws in any civilization takes so much for granted and as a rule is stated in such terse, technical terms, that an interpretation of such laws in the commonly accepted meaning of the words employed often fails to give any adequate conception of their content, let alone their application to life. This is superlatively true of so remote and imperfectly known a period as that of ancient Assyria. Legalists will at once recognize the need for elucidation of terms and an endeavor to restore the method of court procedure.

Such a study not only calls for a highly trained legal specialist but at the same time for an equally skilled philologist. These conditions have been happily met by the collaboration of the two editors of the volume. If the exhaustive legal and philological treatment of the commentary calls for any justification it may be found in the fact that after the most careful investigation the number of unsolved problems due to obscurities and unknown factors is still very large.

It is impossible in a brief survey of so compact a work to enter into minutiae to any extent. A more general point of interest is the relation of the Assyrian laws to the older Babylonian codes. After a thorough examination of the evidence, the conclusion of the editors is that these laws consist of a series of amendments of the then existing laws which were either the Babylonian code of Hammurabi itself or a body of laws of a closely related character. This conclusion binds together the legal tradition of Babylonian civilization into a complex similar to the English-American common law tradition, but with even more far-reaching implications.

The editors have accomplished a task of first-class importance and they promise much more, since the present work is tentatively planned as the first of a series which would deal in a similar manner with all the legal documents of the Ancient Near East, including the legal elements in the Bible. Such a treatment is badly needed and it is to be hoped that nothing will prevent its realization.

The publishers have made the price prohibitive for very many who should have the volume. It is highly desirable that a way be found for a wider distribution at a lower price, for succeeding volumes of the series.

LEROY WATERMAN,
University of Michigan

Leading Articles in Current Legal Periodicals

American Journal of International Law, October (Washington, D. C.)—The Japanese Foreign Office, by Kenneth Colegrove; Soviet Citizenship, by Durward V. Sandifer; The Meaning of the Term Denial of Justice in International Law, by Oliver J. Lissitzyn; The Early American Attitude Toward Naturalized Americans Abroad, by Rising Lake Morrow; Sanctions of International Commodity Agreements, by Payson S. Wild.

Canadian Bar Review, October (Ottawa, Ont.)—Recent Legislation on the English Law of Tort, by Professor P. H. Winfield; "One Man Companies" and Their Controlling Shareholders, by Hon. Mr. Justice Masten; Lord Russell, by Roy St. George Stubbs.

Columbia Law Review, November (New York City)—Irrevocable Credits in International Commerce: Their Legal Nature, by Philip W. Thayer; Collection of Money Judgments: Experimentation with Supplementary Proceedings, by Isadore H. Cohen; A Note on Legal Definitions, by Huntington Cairns.

Commercial Law Journal, November (Chicago)—Shores of Opportunity, by Edward F. Flynn; "Right of an Attorney to Endorse Client's Name to a Check," by J. Hugo Grimm; Annual Banquet of New York Members Association; Unauthorized Practice of Law—Definitions and Limitations, by Maurice M. Goldman; Oregon State Bar Adopts Resolution to Delay Action on Law Lists. North Carolina State Bar Also Agrees; Canada's New Deal, by G. N. Gordon; Convention Sidelights, by Samuel S. Gelberg; The League and Its Membership, by Charles Dautch.

Dickinson Law Review, October (Carlisle, Pa.)—Contractors' Bonds on Federal Construction Projects by Edward H. Cushman; The Brower Anomaly, by Milford J. Meyer; The Annulment of Marriages in Pennsylvania, by F. Eugene Reader.

Fordham Law Review, November (New York City)—St. Ives, Patron Saint of Lawyers—A Symposium, by William L. Ransom, Rev. Louis Lainé; John H. Wigmore; Francois J. M. Olivier-Martin; Rev. Robert J. White; The Tax Burden of the Supreme Court, 1935 Term, by Charles L. B. Loundes; Some Aspects of Joinder of Causes, by Edward Q. Carr.

Harvard Law Review, November (Cambridge, Mass.)—Foreword by Learned Hand; The Common Law in the United States, by Harlan F. Stone; Statutory Developments in Business Corporation Law, 1886-1936, by E. Merrick Dodd, Jr.; Fifty Years of Trusts, by Austin Wakeman Scott.

Illinois Law Review, November (Chicago)—Mortgages, Foreclosures and Reorganizations, by Nathan William MacChesney and Elmer M. Leesman; Sugar: A Rugged Collectivist, by Samuel Mermin.

Michigan Law Review, November (Ann Arbor, Mich.)—Revenue Financing of Public Enterprises, by E. H. Foley, Jr.; Taxation of Undistributed Corporate Profits, by John B. Martin, Jr.; The Fiction of Peaceful Picketing, by Frank E. Cooper.

Mississippi Law Journal, October (University, Miss.)—Proceedings of the Thirty-first Annual Meeting of the Mississippi State Bar.

University of Pennsylvania Law Review, November (Philadelphia, Pa.)—A Suggestion for Revision of the Anti-Trust Laws, by Donald R. Richberg; A Small Claims Court for Pennsylvania, by George Scott Stewart, Jr. and Robert D. Abrahams; Constitutional Issues in the Supreme Court, 1935 Term, by Osmond K. Fraenkel.

St. John's Law Review, November (Brooklyn, N. Y.)—Vision and Workmanship, by Z. Chafee, Jr.; Amendment to the Federal Law Limiting the Liability of Shipowners, by Adele I. Springer; The Anti-Union Contracts, by William Tapley; Implying a Promise to Establish Mutuality, by Frederick A. Whitney.

Temple Law Quarterly, November (Philadelphia, Pa.)—Social Security and Constitutional Reform, by Bruce R. Trimble; Tracing Trust Funds—Modern Doctrines, by Sylvan H. Hirsch; Recent Proposals to Amend the Constitution of the United States by Jacob Tanger; Doing Business as Applied to Foreign Corporations, by Austin Gavin.

Texas Law Review, October (Austin, Tex.)—Proceedings of Texas Bar Association.

United States Law Review, October (New York City)—Interstate Compacts, by Alice Mary Dodd.

DEPOSITIONS, DISCOVERY AND SUMMARY JUDGMENTS

As Dealt with In Title V of the Proposed Rules of Civil Procedure for the Federal Courts*

By Martin Conboy
Member of the New York Bar

Title V—Depositions, Discovery and Summary Judgments

DEPOSITIONS and discovery before trial and summary judgment upon motion are dealt with in Title V of the proposed rules of Civil Procedure for the Federal Courts.

The practice provided by the proposed rules with respect to depositions and discovery before trial permits greater latitude than that now existing in New York and a large number of other states in particulars which I shall later consider, but has a basis in rules which have been tried in American jurisdictions.

The proposed rules with respect to summary judgment constitute in some particulars a departure from any existing practice, and accordingly, have not been fully tested by experience.

Depositions and Discovery before Trial—Origin—The Ecclesiastical Courts

Discovery was adopted by the Court of Chancery from the ecclesiastical practice. The English ecclesiastical courts were established by an ordinance of William the Conqueror upon the model of the spiritual courts on the continent and they employed the canon law, both procedural and substantive, unaffected by the common law. In the ecclesiastical courts, the first pleading, the "libel," contained a brief statement, not to set forth the facts, but to identify the legal nature of the case and to specify the relief sought. The exception, the defendant's pleading, briefly stated the nature of the defense. When the pleadings were completed each of the parties prepared a detailed statement in writing of the facts in support of his own pleadings so far as he supposed them to be within the knowledge of his adversary. Each paragraph was called a "position" and the statement "the positions." They were submitted to the judge and the adverse party was required to appear to be examined orally by the judge upon the detailed facts set forth in the positions, the party seeking the discovery not being present. The answers to the judge's questions were written, sworn to and submitted to the party exhibiting the positions. These answers could be used as admissions of, but not as evidence on behalf of the party examined, in somewhat the same manner as is provided by proposed Rule 31. Thereafter each party prepared a statement of facts called "the articles" which he expected to prove by witnesses. Examination of the witnesses on the articles was likewise conducted by the judge orally and in secret, but since the testimony could be used as evidence on the trial cross-examination was allowed and was conducted by written interrogatories delivered to the judge. The interrogatories for cross-examination were drawn from the articles without knowledge of the answers given by the witness. They were not delivered to the adverse party calling the witness, and he therefore had no opportunity to tamper with the witness or to suggest the answers.

The practice of oral examination by the judge on the positions ceased at an early period and the parties were permitted to prepare written answers to the positions with the aid of their counsel. It was a short step to a combination of the positions and articles in one document, each paragraph being both a position and an article. The adverse party was required to answer all the positions and articles to the extent of his knowledge, and witnesses were produced to prove what the adverse party denied or refused to admit. Answers beyond the articles were suppressed, the witness being called extra-articulate.

The first pleading which combined the positions and articles, although called a libel, combined in itself the libel proper and also the positions and articles founded upon it. It set forth the plaintiff's evidence in the same detail in which he expected to produce it, and the defendant thereby obtained full knowledge of the plaintiff's evidence and was required to give his answers with respect thereto.

The Chancery Court

In the Court of Chancery the chancellor who was generally a churchman followed the early ecclesiastical court practice of uniting discovery with the pleadings. In drawing bills in equity it became a general rule that evidence must be stated for the purpose of obtaining discovery; for all other purposes only facts need be alleged. Under this rule the complainant stated the facts of the case in the stating part of the bill and stated or "charged" evidence of those facts in the charging part.

Interrogatories were inserted in bills of equity with a view to obtaining a more full and explicit answer from the defendant. Even without them the defendant had to answer all the allegations and charges in the bill, and with them only the interrogatories which were based upon the allegations or charges. The interrogatories constituted no part of the libel in the ecclesiastical law and originally constituted no part of the bill in equity.

Equity afforded to a pleader a method of discovery of evidence to support his own case. By the discovery the pleader obtained admissions from his adversary regarding matters which he himself and not

*Address delivered before the Open Forum Session for discussion of the Proposed Rules of Civil Procedure for Federal District Courts, at the Annual Meeting of the American Bar Association, at Boston, on August 26, 1936.

the adversary was required to prove. Nevertheless, as in the ecclesiastical practice, the pleader in obtaining discovery had to disclose his own evidence and was not given the advantage, which he later obtained under the New York practice, of obtaining discovery of defendant's evidence while concealing his own until the trial.

Examination Before Trial

Chancery practice permitted the use of bills in equity not only for the purpose of obtaining both discovery and relief, but also in aid of an action at law, there being no way recognized by the early law courts in which a party could ascertain from his adversary information or facts for the purpose of his suit.

Under the reformed practice adopted in England by the Judicature Act of 1875, any party, whether his action is based upon legal or equitable principles, may deliver to his adversary written interrogatories requiring sworn answers. This method of examination before trial by written interrogatories is still followed in England and Massachusetts where the scope of the examination is limited only by the issues and is to be permitted as an optional method of procedure under Rule 31 as proposed. Such method does not prevent the answers from being framed by or with the aid of counsel, a practice which the ecclesiastical courts thought it necessary to prevent.

The New York Code of Procedure of 1848 (Section 390) contained a provision for oral examination of adverse parties before trial without limit upon the scope of the examination, but New York lawyers even after the adoption of the code were restricted by the traditional idea that in Chancery the right of a party to a discovery did not extend to all facts material to the issue, but was limited to such material facts as were necessary to establish his cause of action or defense.

In 1870, a rule of court (21st rule) was adopted limiting the discovery to facts material in proving the case or defense of the party seeking the discovery. In 1885 the New York Supreme Court said in *Adams v. Cavanaugh*, 37 Hun. 232:

"The weight of authority before as well as subsequent to the rule referred to was in favor of limiting examinations to such facts as were material to establish the cause of action or defense of the party who sought the examination; and not to permit the evidence which related exclusively to the cause of action or defense of the examined party to be inquired into." * * *

"The examination of parties under the old code was a substitute for a bill of discovery." * * *

"The Court of Chancery never exercised or assumed to possess the power to compel a party to disclose evidence exclusively relating to his own cause of action or defense."

Thus with respect to the matters upon which a party had the burden of proof he could examine his adversary and obtain his evidence in detail while concealing his own.

Despite the frequent reforms which have since been made in the New York Law as to examinations before trial, the influence of the limitations of the equity practice persists. The Civil Practice Act, Section 288, provides that any party may cause to be taken by deposition before trial his own testimony or that of any other party which is material and necessary to the prosecution or defense of the action. This section and a similar section in the Code of Civil Procedure were originally construed as providing that a party may have an examination to prove his own cause only and not to disprove his adversary's claim, that is, that the examination was confined to the issues concerning which the party applicant had the burden of proof under the pleadings. In spite of a recent decision of the Court of Appeals (*Public National Bank v. National City Bank*, 261 N. Y. 316 (1933)) that the Civil Practice Act imposes no such limitations upon examinations before trial, as a matter of law, nevertheless, in the exercise of discretion the judges continue the limitation except in unusual cases. This results in a lack of mutuality of discovery as between plaintiffs and defendants, for, unlike the early ecclesiastical and chancery practice, the plaintiff is not required to disclose his evidence as a means of obtaining the evidence of the defendant. The limitation has also caused a vast amount of unnecessary litigation, in the form of preliminary motions and appeals, to ascertain the permissible scope of the examination.

Lawyers have often expressed a traditional aversion to the practice of examinations before trial on the ground that a party is permitted to take the deposition of his adversary in a pending case merely to ascertain in advance what his testimony will be and to annoy and oppress him and not primarily for the purpose of using the evidence and urge that this is an improper use of judicial authority and process. This objection is not without force where the examination is not permitted equally by plaintiff and defendant with respect to all issues. In Ragland, Discovery before Trial, it is said:

"The experience of lawyers in jurisdictions in which an unrestricted examination is allowed is that where each party pins his adversary down to a definite and detailed story in advance of the trial, the truth is discovered and perjury curtailed. The mutuality of discovery is the saving factor. In New York, on the contrary, one party, the plaintiff, can find out his opponent's expected testimony as to one side of the controversy and perhaps by fishing get glimpses of the other side also. Is there anything to prevent the plaintiff from manufacturing a story to meet this? Elsewhere the plaintiff is prevented from such tactics because he has already bound himself on his examination to his detailed position with regard to the facts. The defendant may have a similar right to discover as to his affirmative defenses, but that is not sufficient to bind his adversary definitely and perchance he may have no affirmative defense."

"Another result of the lack of a full and mutual disclosure under the New York rule is that the plaintiff may be allowed to seek material to build up a case which has no basis in fact. The defendant has no reciprocal right to a weapon with which to meet an unmeritorious case."

Against the traditional objections that a full and complete right of discovery before trial permits fishing expeditions and allows a party to oppress and annoy his adversary must be weighed the desirability and advantage of eliciting the facts in advance of the trial in order that the issues may be clearly defined and perhaps the need of a trial obviated. It has been suggested that unlimited discovery and examination before trial may encourage irresponsible litigation but I think that it should have the opposite effect. Irresponsible litigants are plaintiffs and not defendants. Under the present New York rule the plaintiff may examine the defendant for the purpose of establishing his cause of action while a defendant has no right of examination as to the plaintiff's claims. Under such a rule in the

case of irresponsible litigation defendants are at a disadvantage which would be removed by permitting free examination of both parties in advance of trial.

The proposed rule 31 goes the full distance in permitting unlimited discovery before trial. Any party may at any time after the action has been instituted take the testimony of any person, whether his adversary or otherwise. The deponent may be examined regarding any matter which is relevant to the pending action in the same manner in which he could be examined on the trial. An adverse party or a hostile witness may be examined as if under cross-examination. The limitations on the scope of examinations before trial which persist in New York and in those states which have followed its code provisions will not arise in the Federal Courts under the proposed rules.

The Methods of Examination Before Trial

In England, Massachusetts, and certain other states examination before trial may be conducted only upon written interrogatories. Under the English Order XXXI Rule 12 a party by leave of the Court may deliver interrogatories in writing. The examination is instituted by leaving a copy of the proposed interrogatories with the adverse party, together with a notice of application to the Court for leave to deliver them, and the interrogatories are then submitted to a master for directions. In this manner the propriety of each question to be asked is determined in advance of the examination.

In New York and in most other states the examination before trial is conducted orally and in theory in the presence of a judge who in practice will rule on the propriety of any question presented to him. The examination may be initiated either by notice given to the other party or by motion. Where a party initiates the examination by notice as is the usual practice, his notice must set out the matters upon which the examination is to be held and any question as to the right to take the testimony is raised by motion to vacate or modify the notice. An objection to any question upon the examination may be presented to the judge before answer.

The proposed rules before the Federal Courts permit examinations to be conducted both orally and on written interrogatories. The examination in either case may be instituted by a simple notice served on the adverse party. Rule 31 provides for the taking of testimony of both of the parties and of any other person who might be called as a witness at the trial upon any matter relevant to the action. The deposition of a party may be used by an adverse party for any purpose. Any deposition may be used to contradict the witness on the stand. A deposition of a witness not a party may be used only if the witness is unavailable at the trial.

The persons before whom depositions may be taken, the manner of their taking, and the preparation of the record are covered in the proposed rules 32 through 36. In order to furnish protection from annoyance or oppression where there is reason to believe that the examination may be conducted for an improper purpose or may include irrelevant matter, any party has the right to apply to the Court to compel his deposition to be taken before a master who may be authorized to rule on the admission of evidence. The right is also given to any party to apply to the Court for an order suspending the taking of the examination where it is shown that the examination is being conducted in bad faith or for the purpose of oppressing,

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annoying or embarrassing the party being examined. These provisions are designed as safeguards on the otherwise unlimited right and scope of examinations given by rule 31.

Rule 37 permits any party to obtain from his adversary by written request a list of all papers, documents or other tangible things known to him and relevant to any matter involved which are or have been in his possession or under his control. No order of the Court is necessary to obtain such a list and the burden is placed upon the party served with the request to apply for an order modifying it, if grounds for its modification exist. As this rule goes a long way towards asking a lawyer to prepare his adversary's case, is to be applied throughout the country and is particularly susceptible to abuse in large cities where often trial counsel are not known to their adversaries or the judge, would it not be desirable to experiment first with a rule requiring such listing only upon order of the Court as is now provided by the English orders (Order XXI, Rules 12, 13, 13A).

The rules contain no provision for the exclusion of objectionable questions before answer, if asked in good faith and in the absence of a master. The oral examinations in the ecclesiastical courts by an impartial judge furnished adequate protection. The suppression of the volunteered testimony by an extra-articulate witness was sufficient. An oral examination by counsel seems to require the right to judicial determination of the propriety of any question before answer, particularly upon the examination of an adverse party If resort to the Federal judges is permitted, perhaps they can prevent abuse of the privilege by either the interrogator or the objector. Perhaps the judge should have the power to appoint a master on his own mo-

tion, if either objector or interrogator should be unduly aggressive. Power might even be conferred upon the judge to decide who should advance the expense of the master in such cases. It may be advisable to accord counsel at any stage of the examination the privilege of moving for the appontment of a master to pass upon all further questions. Perhaps only experience can demonstrate the necessary safeguards without imposing an undue burden upon our Federal judges, but the right to a judicial determination seems necessary where the production, inspection and copying of documents and papers is involved.

Rule 39 permits, upon court order, an examination of the physical or mental condition of a party in any action in which such condition is involved. There has been a similar provision in New York for many years, limited, however, to personal injury suits.

Rule 40 provides for requests by one party to the other for written admissions of the genuineness of documents and written admissions of specified relevant facts. There is a similar provision in Order XXXII of the English Orders, in Section 322 and 323 of the New York Civil Practice Act and in the New Jersey Practice Act of 1912.

The practical advantages of the right of free and unlimited discovery before trial are that it will eliminate surprise, will facilitate the obtaining of evidence and thereby tend to lessen the expense of the trial and probably result in the disposition of much litigation without need of trial. When all the facts have been disclosed, it may be clear to one of the parties that he has no case. The facts disclosed by the examination before trial may serve as a basis for an application for summary judgment. Judge Edward R. Finch of the New York Court of Appeals has said in this regard with respect to the New York practice:

"Thus these two progressive procedural changes are singularly effective, not only when employed alone, but also when combined together in promoting the prompt and efficient administration of justice."

This brings us to the kindred matter of the summary judgment procedure provided by the rules.

Summary Judgment

Rules 42 and 43 as proposed have to do with summary judgment. Rule 42 permits a motion for summary judgment upon the pleadings, depositions, and admissions on file, and judgment may be given if the Court finds there is no substantial issue of fact affecting the right of the moving party to judgment.

Rule 43 permits judgment to be given to a claimant on affidavits "setting forth facts which on their face would require a decision in his favor as a matter of law," unless substantial evidence in denial or avoidance is presented in an opposing affidavit. Claimant and defendant have equal rights to move for judgment.

As the rules are to apply to all the United States District Courts, they will be an innovation in many jurisdictions. In many states relief by way of summary judgment is not now available, and the present practice in the District Courts under the Conformity Act conforms to the laws of the several states.

The purpose of summary judgment is to enable a party who has an undeniable cause of action or defense to be freed from the delays involved in sham claims or defenses presented by his adversary and from the expense and inconveniences of a trial. The effect of the rule is to enable the Court to find in advance that there is no issue of fact which necessitates a trial.

The practice of summary judgment is now in use to some extent in New York, New Jersey, Connecticut, Illinois, Michigan, Rhode Island, and other states, although the rules vary from state to state. In those states the principle of summary judgment has been adopted from the orders of the Supreme Court of Judicature of England.

The rules now under consideration are a departure from the existing English and American rules, inasmuch as there is here no restriction to any class of action, whereas there are such restrictions in other jurisdictions. Further under the proposed rules the relief is made available for both plaintiff and defendant as it now is in New York. In most jurisdictions it is at present available only to persons seeking affirmative relief. In New York the right to move for summary judgment is still restricted to an enumerated class of cases. In England it is now available in all actions at law, except libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise to marry and actions in which fraud is alleged by the plaintiff.

Summary Judgment in New York

After the adoption of the New York summary judgment rule in 1921, the right of the Courts to decide that there was no issue of fact necessitating a trial was promptly challenged as in conflict with the constitutional right to trial by jury. On this point the New York Appellate Division in 1922. (*Dwan v. Massarene,* 199 App. Div. 872) held:

"The Constitution provides (Article 1, Section 2) 'The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever.' It secures the right to a jury trial of the issues of fact in those cases where it had been theretofore used. This did not deprive the Court of the power to determine whether there was an issue of fact to be tried; but if the Court determined there was such an issue, it must be tried by a jury. A false denial interposed for the purpose of delay did not create such an issue any more than a false affirmative defense. * * * The Court is not authorized to try the issue but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury."

There was a similar holding by the Court of Appeals in 1923 in *General Investment Co. v. Interborough Rapid Transit Company,* 235 N. Y. 133.

As early as 1836 the Supreme Court of Judicature of New York held that the Courts had the inherent power to dismiss affirmative defenses upon affidavits stating that the defenses were entirely false and put in merely for delay. In *Broome County Bank v. Lewis,* 18 Wendell 565, the Court said:

"The propriety of exercising that power is manifest from the consideration, if there were no others, that it is unbecoming the dignity of courts of law; that it is unfit and improper in itself, and unjust to other suitors, that courts should be compelled to examine and decide questions which have no foundation in the facts of the case, but only in the ingenuity or imagination of the attorneys. It would be a reproach upon the administration of justice if delays could be procured by what may properly be denominated frauds upon the right of pleading. In such cases it is very clear that no injustice can be done. The defendant in this case appears by his counsel to resist this motion, but he produces no general or special affidavit of merits; makes no pretense that his pleas are true, but on the contrary, by his silence admits that they are false, that he has no defense to make to the note except what has been allowed, and that the pleas were pleaded merely for delay."

The Courts, however, made a distinction between affirmative defenses and denials. In 1834 the same Court had denied "as an unheard-of motion" a mo-

tion to strike out the *general* issue as a false plea. *Wood v. Sutton*, 12 Wendell 235.

The first New York Code of Procedure adopted in 1848 provided (Section 152) that "sham and irrelevant answers and defenses may be stricken out on motion and upon such terms as the Courts may in their discretion impose."

In spite of the broad language of this section the New York Courts continued to maintain the distinction between affirmative defenses, which could be stricken out as sham, and general denials, which could not, on the ground that a defendant in any case was entitled to put the plaintiff to his proof and that the striking out of a general denial deprived a defendant of his right of trial by jury. It was apparent, therefore, that the remedy for the situation which made an artificial distinction between false affirmative defenses and false denials called for consideration.

In 1921 Section 113 of the rules adopted by the Supreme Court under the Civil Practice Act introduced the principle of summary judgment, but applied it only in actions to recover a debt or liquidated demand arising on a contract or on a judgment for a stated sum. By amendment of the rule in 1932 the remedy was made available in actions on a contract to recover an unliquidated sum, to recover a chattel, to foreclose a mortgage, for specific performance and for an accounting on a written contract. By amendment in 1933 the remedy was made available to defendants as well as plaintiffs.

In New York it has been the experience that summary judgment is more effectively applied in actions in which the evidence is almost entirely documentary, and less resorted to in actions in which documentary evidence is unavailable. Motions are more often granted in actions involving the collection of bills and accounts than in actions for services rendered or for the recovery of money loaned. The English rule which authorizes the practice in all actions in the Kings Bench Division except in specified cases was only adopted in 1935, and has not been long enough in effect to lead to any conclusion as to its value.

In adopting the New York rule for use in other states, the rules or statutes have generally provided for summary judgment only in certain enumerated types of action. Dean Clark, one of the Committee who drafted the proposed rules, in an article in the AMERICAN BAR ASSOCIATION JOURNAL in 1929 offered an explanation of this limitation as applied to the State of Connecticut which adopted the practice by rule of Court in 1929 and made it applicable to an extensive classification of cases. He said:

"One might perhaps ask why the enumerated actions should be chosen and why either a lesser or a greater number or even all actions should not be subject to the same procedure. The answer depends on wholly practical reasons. The summary judgment will work best in the comparatively simple case where no defense or one easily set forth by affidavits may be expected. Where due to the complexity of the case the judges will hesitate to enter a summary judgment, the effect of the new procedure may be to slow up rather than expedite administration of justice. Experience must, therefore, determine the character of the cases where it will prove effective. Judging by the precedents of other places, the choice here made is a sound one. If, however, additions or even omissions may later seem desirable, these may be made as experience dictates."

When summary judgment was adopted by New Jersey in its Short Practice Act of 1912, which largely copied the orders of the English Supreme Court, the procedure was made available only in a limited class of cases.

The proposed rule 43 which is applicable to all actions also goes considerably beyond the existing New York rule and the English order with respect to the procedure on the motion. It provides that the Court may in its discretion permit affidavits to be supplemented or opposed by depositions, oral testimony or other evidence, or may permit further affidavits to be filed at any time, or may permit or require any affiant to be present in Court for examination or cross-examination. This is not without its obvious dangers. In an early case in England in 1888, under order XIV, one of the judges of the Queen's Bench said:

"It is most important that order XIV which, if properly acted upon, was most beneficial to the suitors by saving unnecessary litigation, should not be perverted to the trial of disputed questions of fact. He had the greatest distrust of affidavits upon disputed questions of fact and would never consent to try such facts upon affidavit. The affidavits were contradictory and he was struck with the remark of one of the judges that there must be perjury on one side or the other. How was it to be tried: on which side was the perjury? How could this be tried upon affidavits? Upon such a conflict of affidavits it was only just that the defendants should be allowed the opportunity of defending upon the merits and that without any condition."

In New York the Courts have held that if there is an issue of fact, the issue should be tried in the regular manner. Summary judgment is to be granted only where no issue exists in fact. The proposed rule 43 goes much beyond this practice. It permits the examination of affiants and the taking of testimony during a proceeding which may prove to be only a preliminary to a trial of the issues. Thus, it may practically result in two trials in cases where the Court after hearing testimony on the motion holds that there is an issue of fact to be tried.

That the probability of such duplication of trial has been foreseen and some provision made to limit the attendant waste of time, expense and judicial effort is indicated in the proposed rule 44, which reads as follows:

"If, on motion under Rules 42 and 43, judgment shall not be rendered upon the whole case or for all the relief asked and a trial shall be necessary, the court, at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, so far as may be conveniently possible, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as may be just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly, unless the court, for good cause shown, sets aside its previous order."

This method is used under local court rules in Detroit, Michigan, and by the Superior Court of Boston. There is a somewhat similar provision in the New York rule which permits the Court to give judgment subject to the assessment of the damages in the usual manner.

ANNOUNCEMENT OF 1937 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

INFORMATION FOR CONTESTANTS

Subject to be discussed:

"The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers."

Time when essay must be submitted:

On or before March 1, 1937.

Amount of Prize:

Two Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, officers, members of the Board of Governors, and employees of the Association.

No entry will be accepted unless written specially for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted. Any essay not desired for further use by the Association will, upon request of its author, be returned and the interest of the Association therein waived.

No entry shall contain more than 10,000 words, including quoted matter and footnotes, but citations will not be counted. Each contestant must agree to abide by the decision of the Board of Governors in the selection of the winner and on any question raised.

Procedure:

Anyone wishing to enter the contest shall communicate promptly with Olive G. Ricker, Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish:

(a) entry number in quadruplicate, in a container sealed prior to receipt of any application, so that the number therein may be known only to the recipient;

(b) large envelope, addressed, for mailing essay;

(c) small envelope, addressed, for mailing one of the entry numbers together with printed form to be filled in by the contestant to show name and address; which will thereafter not be opened until the winning essay has been selected and its identifying number announced.

Essay is to be submitted in triplicate, typewritten, double spaced, on one side of plain white paper, letter size (8½x11), and mailed as first class matter, without folding, in the envelope furnished for that purpose, on or before March 1, 1937. Total number of words on each page shall be typed on bottom of each page of at least one copy. For identification, one of the entry numbers furnished for that purpose shall be affixed to each of the three copies of the essay. Any other identifying mark on the essay or on the envelope containing the same, or on the envelope containing the fourth number and the name and address of the contestant, will disqualify the entry.

The fourth entry number shall be attached to a printed form on which the entryman shall type his full name and address, sign the agreement printed thereon, and then seal for mailing in the envelope furnished for that purpose. The envelope, when prepared for mailing, will be held by the entryman until March 2, 1937, and then mailed. It is not to accompany the essay in envelope, which must be postmarked not later than March 1, 1937.

No additional information will be given by the Executive Secretary. Any questions raised will be submitted to the Board of Governors for consideration.

ANNOUNCEMENT OF PATRIOTIC ESSAY CONTEST UNDER AUSPICES OF AMERICAN BAR ASSOCIATION

The American Bar Association, through its Committee on American Citizenship, announces its first annual essay contest, to be conducted in the Teachers Colleges and Normal Schools throughout the United States. The Association is offering One Thousand Dollars ($1,000.00) in cash prizes to the writers of the four best essays on the subject selected.

Eligibility:

Any regularly registered undergraduate student attending any Teachers College or Normal School in the United States is eligible to the competition.

Subject:

"How and to What Extent are the Rights and Liberties of the Individual Protected Under the Constitution of the United States?"

Procedure:

Any eligible student who wishes to submit an essay should write to:

Executive Secretary,
American Bar Association,
1140 North Dearborn Street,
Chicago, Illinois,

to obtain a *number*, with instructions as to its use in submitting the essay.

Date of Submission:

No essay will be considered for a prize unless it has been received by the Executive Secretary of the Association, 1140 North Dearborn Street, Chicago, Illinois, on or before April 1st, 1937.

Form of Submission:

Each contestant shall submit his essay in triplicate, typewritten, double spaced, on one side of plain white paper, letter size (about 8½ x 11), and mail as first class matter without folding. It shall not disclose the name of the writer or bear any distinguishing mark except the State in which his school is situated, the name of which State shall be typed at the top of the first page, and the number obtained from the Executive Secretary. The name of the author shall be submitted to the Executive Secretary in a separate envelope duly sealed, which envelope will be furnished for that purpose.

Length of Essay:

Not to exceed four thousand words, including footnotes, if any. Citations will not be counted among the four thousand words, but quotations will be counted,

whether included in footnotes or otherwise. The total number of words on each page shall be typed at the bottom of such page of at least one of the triplicate copies.

Prizes:

The following cash prizes will be awarded:

The writer of the essay awarded first place shall receive $400.00; second place, $300.00; third place, $200.00; and fourth place, $100.00.

The awards will be made by the Board of Governors of the American Bar Association, at the 1937 annual meeting of the Association in Kansas City, Missouri, upon the recommendation of a committee of three judges selected by the President of the Association.

State Bar Associations:

The President of each State Bar Association is asked to select a committee of three members of the American Bar Association within such State to act as judges of the contest for such State. In each State which advises the Executive Secretary that such a committee of judges has been appointed, the essays from such State will be submitted to that committee of judges, who will be asked to decide the two best essays from such State. Those two essays shall be returned by June 1st, 1937, to the Executive Secretary of the American Bar Association and will be the only essays from that State submitted to the committee of judges appointed by the President of the American Bar Association. No essays will be submitted to the said committee of judges which have not been so received from such a committee of a State Bar Association. Each State Association is invited to cooperate by offering prizes or awards for the essays submitted by students from such State. The Board of Governors of the American Bar Association reserves full discretion as to rules of the contest and the making of the award.

For any additional information desired, address:

Executive Secretary,
American Bar Association,
1140 North Dearborn Street,
Chicago, Illinois.

Legal Ethics and Professional Discipline

War Declared on Lawyers Aiding in the Illegal Practice of Law

THE Committee on Unauthorized Practice of the Law and the Committee on Professional Ethics and Grievances of the American Bar Association have entered into a plan of cooperation in an attempt to stamp out the unauthorized practice of the law that both the welfare of the public and that of the profession require.

When a lay agency engages in the practice of law, it nearly always has the cooperation of a lawyer. In fact, the assistance of a lawyer is indispensable to such practice. The law as to what constitutes practice of law is now well settled. Members of the bar cannot claim that they are ignorant of the wrong they do, when they aid lay agencies in the practice of law. In many, if not most, cases, the lawyer is the greater culprit of the two. The Committee on Unauthorized Practice will report all cases of attorneys aiding in the illegal practice of the law to the Committee on Professional Ethics and Grievances, and action against lawyer and lay agency will proceed concurrently.

Florida Supreme Court Establishes Special Disciplinary Procedure on Request of Bar

On a petition of the Jacksonville Bar Association for a special rule permitting the Circuit Courts of the state to appoint commissions to make investigations and report their findings of fact to the Circuit Court for appropriate action, the Supreme Court of Florida ruled that it had inherent power to make necessary rules for the proper performance of its functions and the functions of its officers and subordinates as well as rules to facilitate the administration of justice.

"It follows," said the Court in a per curiam opinion, "that the acknowledged power of the Supreme Court to prescribe rules of conduct for the discipline of attorneys admitted to practice before it, and before the inferior courts, comprehends and includes the power and right by a general rule to set up, or provide for setting up, judicial agencies in the nature of special judicial commissions for the purpose of vesting in them the right and authority to take such steps and proceedings as may be necessary to inquire into and investigate charges of alleged professional misconduct on the part of attorneys.

"It is therefore considered, ordered, and adjudged by this court that the petition of the Jacksonville Bar Association is well founded, and pursuant thereto that the following special rule of the Supreme Court, to be entitled, 'Special Procedure for Inquiries into Charges of Official Misconduct on the Part of Attorneys,' be and the same is hereby adopted and promulgated to be effective October 1, 1936:

"'(a) The Judge or Judges of each of the several Judicial Circuits of this State are hereby authorized to establish commissions to investigate all complaints of professional misconduct of attorneys at the bar of such circuits.

"'(b) Such commissions shall consist of not less than three nor more than nine members who shall be selected from practicing attorneys at the bar of said circuits and who shall be designated by order of the Judge or Judges of the Circuit Court to serve until further order of the Court, but not exceeding one year from date of appointment, and no attorney who has been appointed and has served on any such commission for a period of one year shall be eligible for re-appointment until the lapse of a year after such service has been concluded.

"'(c) Such commission shall make its report of testimony, evidence and findings, together with its recommendations in each case, to the Judge or Judges from whom it received its appointment.

"'(d) Any commission duly appointed under this Rule may procure the attendance of witnesses before it by subpoena which shall be issued by the Clerk of the Circuit Court upon the request of the commission or the Chairman thereof.

"'(e) In the event that the commission shall determine that any complaint before it for investigation is well founded, it shall forthwith submit its report, together with a transcript of the testimony taken and evidence adduced, to the Judge or Judges of the Circuit Court, with its recommendations for such further action as may be deemed advisable by the commission.

"'(f) Investigations, reports and findings by the commission shall not be docketed or recorded in the public records, but are intended to aid the several courts of this State in investigating complaints against attorneys at law

Nothing herein shall be construed as depriving the several Circuit Judges of their authority to make such independent investigations of complaints as they may deem advisable.'" —Petition of Jacksonville Bar Association, 169 Southern 674, September 18, 1936.

Bar Proctor Appointed in New York

Mr. Karl A. McCormick, of Buffalo, recently appointed proctor for the Eighth Judicial District of the State of New York by the Judges of the Appellate Division, under authority of a statute recently enacted in that state, holds an office of unique character. His functions will be to aid the courts and the legal profession in doing whatever is possible under existing law by way of stamping out unauthorized practice, looking into charges of unethical conduct by lawyers and endeavoring to keep out of the profession the unprepared and unfit.

The proctor has the power to hold public or private hearing in any part of the state, and he may administer oaths, take testimony, and compel the attendance of witnesses and the production of books and documents.

Accomplishments of this officer will be watched with interest by bar associations everywhere, as the creation of such a position seems to hold possibilities for definite results in the suppression of unauthorized practice and the enforcement of professional ethics.

Fraud on Client Warrants Disbarment

One Harold W. Johnston was consulted in reference to a divorce and was paid an agreed fee of $51 to cover all costs. On subsequent occasions Johnston told his client that complaint had been filed and all details were being taken care of. Thereafter the plaintiff's testimony was taken before a court reporter as referee and he was told by Johnston that nothing further was necessary to be done and that a decree would be entered. No complaint had been filed at that time nor was any filed until after charges had been preferred against Johnston. The Board of Governors of the Oregon State Bar found that these facts constituted misconduct which was intentional and calculated to perpetrate a fraud upon the court and upon Johnston's client, and they recommended disbarment to the Supreme Court. On a petition for review, the Court held that although Johnston, after the charges were preferred, had proceeded to file the complaint in the divorce case and taken proceedings to obtain the divorce, his admitted delinquency was a deceit and a fraud upon his client and also upon the court and merited disbarment.

Ex parte Johnston (Ore.) October 13, 1936, 61 Pac. (2d) 296.

Offense Committed by a Judge May Later Serve as Ground for Disbarment

"Acts committed by a lawyer during the period when he was the Judge of a State Court of Record, may be sufficient to warrant his disbarment after he has ceased to hold such office although the public policy of the state prohibits disbarment proceedings against such a judge during his incumbency."

Such was the holding of the court in the case of Weston v. Board of Governors of State Bar, Oklahoma Sup. Ct., 61 Pac. (2nd) 229, decided September 22, 1936.

In the course of the opinion, Judge Welch said:

"We conclude that plaintiff's contention of lack of jurisdiction in the state bar cannot be sustained. We hold that the board of governors of the state bar have the jurisdiction and authority to hear charges against a practicing lawyer of disbarrable offenses involving moral turpitude rendering him unfit to be permitted to continue the practice of law, even though the offenses evidencing such loss of character occurred while he theretofore held judicial office.

"In such a hearing that board should not take cognizance of any charge merely relating to lack of diligence in office, or to incorrect action or decision of cases, or to matters involving judicial discretion while in office. Such matters may be attacked and corrected by appeal, or by appropriate proceedings to remove from office if justified by the facts, but may not be the subject of state bar action, either during or after the tenure in office of the judge. In short, the state bar may not control or supervise the judges, but the bar may purge itself of unfit members, even though they were formerly judges."

A Confidential Relationship

Petitioner and his wife executed their promissory note for $1000 secured by a third Trust Deed on their home, and received the money from the Guardian of the estate of an incompetent for whom petitioner was attorney. No approval of the loan by the Probate Court was sought or obtained. The security given the Guardian was inadequate and subsequently the first encumbrance on the property was foreclosed.

The question presented was whether the petitioner, a lawyer, by securing a loan without the approval of the Probate Court and giving inadequate security therefor, and failing to repay the same, is guilty of such unprofessional conduct that he ought to be disbarred. The Court said:

"Petitioner is not a novice in the profession. Presumably he was fully familiar with the confidential relationship existing between an attorney and his client, and fully cognizant of the rule which prohibits him from taking any advantage of his client. In the present instance this rule is to be applied more strictly by reason of the fact that the guardian was elderly and to a very considerable degree incapacitated by reason of her age. We cannot believe, in the face of the appraisal put upon the property by the building and loan company, of which the petitioner was fully aware, that he did not know that the security tendered was insufficient. There can be no doubt that had he been acting in good faith he would have asked the Probate Court for an approval of the loan, regardless of whether the same was entirely necessary as a matter of law. Nor do we think it is sufficient for petitioner to reply that the affairs of the guardian were being managed by Quirk. Quirk was not an attorney at law, and was not bound by the same rules of conduct that governed petitioner. But even if he were, Quirk's responsibility would not relieve petitioner of a like responsibility.

"As we have already seen, petitioner was guilty of unprofessional misconduct, and conduct of such a character as to involve a degree of moral turpitude. It can hardly be gainsaid that had petitioner had the proper regard for the interests of the estate or his client he would not have been willing to give the valueless security, particularly where the client was in no position to determine the value of the security. The question is, however, What disciplinary action is necessary in order to protect the courts and the public? Should one who is inclined to impose upon elderly widows administering the affairs of their incompetent kin be allowed to remain a member of the profession, or will suspension for a period of time suffice to effect a reformation? We do not believe that suspension will be efficacious, nor that such a one is entitled to a certificate vouching for his good moral character. Therefore the recommendation of the board of governors of the state bar should be approved.

"It is ordered that petitioner be disbarred, this order to become effective 30 days after the filing of this opinion."

—Laney v. State Bar of California, 60 Pac. (2d) 845; September 18, 1936.

Respondent was convicted in the Federal Court of using the mails for the purpose of obtaining money and property of others by means of fraud and false pretenses. He contends that this judgment is not binding on the Illinois Supreme Court and that he should have been permitted by the committee of the Chicago Bar Association, sitting as commissioners of the Supreme Court, to show his innocence of the crime of which he was charged in the indictment and convicted.

"In many states statutes provide for the disbarment of attorneys upon convictions of crimes involving moral turpitude. * * *

"In Illinois even without a statute on the subject, a judgment of conviction of an attorney of a crime involving moral turpitude is conclusive evidence of his guilt and is ground for disbarment."—In re Needham (Ill.) 4 N.E. (2d) 19; October 7, 1936.

Use of a petition addressed to the Probate Court and of a complaint addressed to the Chicago Bar Association charging a high public official with unprofessional conduct in connection with an estate, in an attempt by threat of a public scandal involving the Federal administration to secure an appointment to office, warrants disbarment. The use of such documents is not only highly unethical and unprofessional, but is to be condemned as contrary to public morals and decency.

"Neither inexperience, personal grievance, nor advanced age will excuse such conduct of one member of the bar against another, nor can it properly be said that activities of this sort are essentially of a private nature, entirely divorced from respondents' official capacities as attorneys at law."—In re Malmin et al, 4 N.E. (2d) 111 (Ill.)

Past Record of Disciplinary Action Is Relevant In Disbarment Proceedings

There appeared in this department of the November, 1936, issue of the Journal, page 825, under the above caption, a quotation from the decision of the Supreme Court of Nevada in In Re Miller, 59 P. 2nd, 9, decided July 2, 1936. We find an excellent statement of this rule in the decision of the Supreme Court of California in the case of Marsh v. State Bar, 2 Cal. 2nd. 75, 39 P. 2nd. 403, where the court said:

"It must first be noted that although the word 'punishment' is frequently used, the discipline of an attorney is not punitive in character. 'This court has uniformly treated disbarment proceedings as peculiar to themselves and governed exclusively by the code sections specifically covering them.' Matter of Danford, 157 Cal. 425, 108 Pac. 322. The purpose of such a proceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual but for the protection of the courts and the legal profession. In re Vaughan, 189 Cal. 491, 496. 209 Pac. 353, 24 A.L.R. 858, quoted with approval in Fish v. State Bar, 214 Cal. 215, 222 4 Pac. 2nd 937; see, also, 1932 Cal. Jur. Supplement, p. 71, or article on The Practice of Law, sec. 38.

"(1) The penalty being designed not to punish the individual but to protect the public, the courts, and the legal profession, is it not clear that in order to fulfill such purpose, the prior record of an attorney must be taken into consideration in determining his fitness to continue in practice? If the prior attempt at discipline has been ineffective to cure the evil, as witness the fact that the same offense has been repeated, then such further penalty should be imposed as will tend to either effect the reformation of the offender or else remove him entirely from the practice. Thus, although the penalty for a repeated offense may be much greater that would have been imposed were it a first offense, such increased penalty is not a 'meting out' of further punishment for prior acts, as contended by petitioner, but is an adjudication of the attorney's fitness to continue in practice.

"(2) It is well established that mitigating circumstances may be considered in determining the punishment to be imposed in disciplinary proceedings, such as the motives and purposes which actuated the accused, his previous good record, his characteristics and nature, testimonials as to his good character and reputation, or his youth and inexperience and the fact that he was not guilty of intentional wrongdoing. Barbee v. State Bar, 213 Cal. 296, 2 Pac. 2nd 353; Dahl v. State Bar, 213 Cal. 160, 1 Pac. (2nd) 977; Mills v. State Bar, 211 Cal. 579, 296 Pac. 280, 297 Pac. 19; In re Petersen, 208 Cal. 42, 280 Pac. 124; In re Sadicoff, 208 Cal. 555, 282 Pac. 952; In re McCowan, 177 Cal. 93, 170 Pac. 1100; 1932 Cal. Jur. Supplement, Article on The Practice of Law, p. 102, sec. 65, and pp. 114, 115, sec. 78, and many cases cited.

"If such mitigating circumstances may be considered in alleviating or lightening the penalty, does it not follow that incriminating circumstances, such as the previous poor record of an accused, his years of practice, knowledge of wrong-doing, repeated misconduct, etc., may likewise be considered in determining whether or not a more severe penalty should be imposed? The fact that an offense is a repetition of offenses for which an accused has previously been disciplined shows that the wrong is not unintentional but is done deliberately with knowledge that such conduct is forbidden and thus it merits a greater penalty."

ERRATA IN OCTOBER, 1936, ISSUE

Judge Charles M. Thomson, of Chicago, writes that the resolution relating to "participation of judges in partisan politics" was not adopted by the Assembly at Boston in the form in which it was printed on page 734 of the October issue of the JOURNAL. The Resolutions Committee amended the resolution by omitting the fourth and seventh paragraphs and also the numbering of two other paragraphs and recommended its adoption as thus amended. The recommendation was approved by the Assembly. The paragraphs omitted are those beginning "And Whereas it has come etc." and "That we call upon all of the Bench etc." The committee stated that it omitted the first of these paragraphs because they felt it unnecessary to give any reason for the resolution, as set out in the paragraph; and the other paragraph because they thought it was substantially included in the following paragraph.

Mr. Mayer C. Goldman, of New York, asks a correction in the statement on page 732 of the October issue, to the effect that "on vote Mr. Goldman's substitute was voted down and the recommendation of the Resolutions Committee was unanimously adopted." He states that the adoption was not unanimous, but by a divided vote.

Mr. Mortimer Riemer, of New York, writes that the "list of resolutions offered" on page 676, October issue, gives him as sponsoring resolutions 11, 12, 13, 17, 18, 19 and 20. The last four of these resolutions, he states, were simply physically handed by him, at the request of their sponsors, to the Secretary, and he had no personal responsibility for them. The only resolutions which he sponsored were Number 11, relating to banks and trust companies; Number 12, relating to the American Law Institute, and Number 13, relating to W.P.A. standards.

On page 726 of the October issue, under the caption, "Dismissal Without Prejudice." the remarks attributed to Mr. W. L. Cain of South Carolina were made by Mr. Douglas McKay of that State.

London Letter

Circuits of the Judges.

The Committee appointed to "review the present distribution of assize facilities, and to report whether, due regard being had to the recommendation of the Peel Commission, that the county should be retained as the judicial unit, any further town should be added to those which are already visited, or any town at present visited should be omitted" has now issued its report. This Committee, which was appointed by the Lord Chancellor in accordance with the recommendations of the Royal Commission on the Despatch of Business at Common Law, and which was referred to in the London Letter in the June issue of the JOURNAL, has not found it necessary to recommend numerous changes. Certain towns, if the recommendations are carried out, will cease to be Assize towns; the North Wales and South Wales circuits will be amalgamated; two judges instead of one will visit certain Assize towns; Newport will be substituted for Monmouth as the Assize town for the county of Monmouth; Sheffield will be given an Assize from the Autumn of 1940; and civil business will be taken on every circuit at every Assize town visited by a judge. The "circuit system" in England provides that judges shall, at frequent intervals, go to every county in the kingdom and hold Assize Courts. The majority of the Members of the Bar, intending to practice, attach themselves permanently to one circuit, and will not attend cases on any other circuit except for a special fee.

Mr. St. J. G. Micklethwait, K.C., a former Treasurer of the Middle Temple, in his reading on the Circuit System, notes that in the old days the Courts at Westminster were closed and members of the profession on the Common law side, both leaders and juniors, started at the beginning of the circuit and went right round to the end. Among the leaders of the circuit were the serjeants, later the King's Counsel, and all the leading juniors. They lived together, traveled together and practised together, forming a sort of club, which later became known as the Circuit Mess. From time to time, as professional rivalry demanded, rules were made governing the conduct of all members of the circuit and eventually a strict code of professional etiquette grew up. They were unwritten rules, but they were very rigidly adhered to and, as Mr. Micklethwait points out, "in substance many of the old rules of the Circuit Mess are rules regulating the profession to-day."

In times gone by riding the circuit was a scene of pageantry. The judges mounted their horses at Holborn or Temple Bar and set off on their travels accompanied by a large concourse of officials, barristers and servants. Where the distance between any two places was great they rested at some gentleman's house, or at some intermediate town. When they were entertained by private gentlemen on their way, the only expenses incurred were in the nature of presents for the servants "usually amounting to half a crown each to the cook, the butler and the stableman and something less for the chamberlain." Upon arrival at the county boundary they were met by the High Sheriff, in full uniform, whose coach was accompanied by armed retainers in livery, and the judges were received with great state and ceremony. Nowadays the judge usually travels by rail to his destination, but he is still met by the High Sheriff with much pomp and dignity, and escorted by police, who are sometimes mounted, and trumpeters in uniform announce his arrival.

In the fourth volume of the Camden Miscellany there is an interesting account of the expenses of Thomas Walmysley, one of the Judges of the Court of Common Pleas, from 1589 to 1612, on his riding the Western Circuit with Edward Fenner, one of the Judges of the Queen's Bench, at the autumn and spring assizes from July, 1596, to March, 1601, and also the account of Thomas Walmysley on his riding the Oxford circuit with Peter Warburton, another justice of the Common Pleas, in the autumn of 1601. These accounts give particulars of all presents of food, wine and beer made to the judges at the various towns where the assizes were held, as well as accounts of purchases made to supplement the gifts. Beer seems to have been the favourite beverage of the judges on these circuits and, if the work done was commensurate with the quantity of beer consumed, then they must have had a very busy time, as it is noted that at Winchester 89 gallons were consumed in three days; at Salisbury 90 gallons in two days, and at Chard and Exeter a whole butt (108 gallons) was required for five days. At Worcester the judges were obliged to pay thirteen pence for water, but in view of their partiality for beer it must be assumed that the water was for washing.

Scientific Investigation of Crime.

In April, 1935, a Committee was appointed by the then Secretary of State for the Home Department to advise as to the "manner in which the Laboratory for the Scientific Investigation of Crime, then about to be established in the Metropolitan Police Force, might best be developed in the national interest, with special regard to the desirability of its being in close and effective touch on the one hand with other police institutions established in this or other countries for the like and cognate purposes and on the other hand with any Medico-Legal or Scientific Institute that may be constituted for teaching and research work in forensic medicine or other relevant sciences."

This Committee, of which Lord Trenchard is Chairman and Lord Atkin Vice-Chairman, has issued an interim Report, recently published by His Majesty's Stationery Office, in which it is noted that the Metropolitan Police Laboratory, which has now been established, is still to some extent in the experimental stage, and that much more time must necessarily elapse before the work undertaken by it can be regarded as having found its proper level and any degree of stability has been reached. The Committee is satisfied that the organization within the police service of a comprehensive laboratory system for the purpose of bringing the resources of science to bear upon the investigation of crime is a development of immense value which should be pressed forward without delay.

The Report emphasizes the fact that the facilities available for the teaching and practice of forensic medicine abroad are incomparably more complete than anything we possess—a state of affairs which is most unsatisfactory. It indicates that the problem is not confined to the restricted sphere of criminal investigation and police practice, but that it extends to such problems as the provision of proper facilities for the study of industrial disease, to the problems which arise out of the general range of post-mortem work, and to the general treatment in the academic sphere of the whole question of medico-legal practice. It is noted that special qualifications in forensic medicine and post-

mortem work are not yet required as a necessary condition to the undertaking of medico-legal post-mortem examinations, and that in many cases these examinations have been carried out by men who cannot be regarded as competent to perform them.

The Committee expresses the view that any scheme which is to meet the requirements of the situation should provide facilities for teaching, routine work, and research, and that these requirements can best be met by the establishment, in London, of a National Medico-Legal Institute, which should be equipped with a mortuary and facilities for the conduct of general post-mortem work; pathological, bacteriological, chemical and physical laboratories; and an adequate library, and that a museum of exhibits should be built up for the use of persons undergoing instruction and more generally for reference by outside workers in the medico-legal sphere.

Fire in the Temple.

Great excitement was caused in the Temple by reason of a fire which broke out, on the 12th October last, at number 3 Pump Court, in residential chambers occupied by a barrister of the Middle Temple. The Middle Temple fireman was quickly on the scene and, as the Temple is in the City's "danger zone" for fire calls, he was very soon joined by sixty firemen and twelve engines. In spite of the fact that one room was completely gutted and others badly damaged, and that a tree in the court was set on fire, the brigade was able to confine the blaze to the set of chambers in which it originated. Tenants of the floor above, finding their way down the staircase blocked by smoke, sought safety by means of the fire escape over roofs to the chambers of a tenant in an adjoining court.

Chairman of London Sessions.

Sir Percival Clarke, Chairman of the County of London Sessions, died on the 5th October, at the age of 64. Sir Percival was the eldest son of the late Rt. Hon. Sir Edward Clarke, K.C. He was educated at Eton and Trinity Hall, Cambridge, and was called to the Bar at Lincoln's Inn in 1894, becoming a Bencher of that Inn in 1925. He was knighted in 1931. A memorial service was held for him in Lincoln's Inn Chapel on October 19th.

Under the scheme of the London County Council for regulating the holding of Courts of Quarter Sessions for the County of London approved by the Secretary of State for the Home Department, in accordance with the provisions of the Local Government Act, 1888 (s. 42(7)), Sessions are held twice in each month. The first sessions in January, April, July and October are the Quarter Sessions, and those remaining are known as Adjourned Quarter Sessions.

Sir Henry Curtice Bennett, K.C., has been appointed to succeed Sir Percival Clarke as Chairman of the County of London Sessions. Sir Henry, who is 57 years of age, is the eldest son of the late Sir Henry Curtis Bennett, who was chief Metropolitan Magistrate. He was called to the Bar at the Middle Temple in 1902 and became a Bencher of his Inn in 1926. During the War he served in the Secret Service and, in the course of his duties, interviewed a number of spies and suspects. It is well known that by his acceptance of the postion of Chairman of the London Sessions he gives up a very lucrative practice at the Bar.

Middle Temple Hall.

The repairs to the Middle Temple Hall, to which reference was made in the London Letter of June last, have been completed and the west wall and buttresses now rest on a solid foundation of concrete 30 feet deep. While the work was in progress it was found that the movement was more serious than was supposed and for some time there was a very real danger of collapse. However, the task has been successfully accomplished and in a way which does credit to all concerned.

Opening of the Courts.

The Michaelmas Law Sittings began on October 12th, when the Law Courts in London opened after the Long Vacation. The opening was preceded by a special service in Westminster Abbey, which was attended by most of the judges, wearing their full robes, and a large number of King's Counsel and Members of the Bar. Red Mass was said at Westminster Cathedral. From Westminster the Judges proceeded to the Royal Courts of Justice and the usual procession through the Central Hall, where stands the statue of Sir William Blackstone presented by the American Bar Association on the occasion of their visit to this country in 1924, took place. In the absence of the Lord Chancellor (Lord Hailsham) through illness, the procession was headed by the Lord Chief Justice (Lord Hewart). The crowd which had assembled in the Hall to watch was larger than usual, many visitors from the United States being present. Prior to 1931 it was customary for the Lord Chancellor to hold a reception, known as the Lord Chancellor's breakfast, on the occasion of the opening of the Courts after the vacation, but in that year in view of the need for economy, it was discontinued and the custom has not since been revived. There is upon record, in Sir Henry Cunningham's Biographical Sketch of Lord Bowen, an amusing request by Lord Bowen to his friend the Hon. Mr. Justice [J. C.] Mathew for a lift in his carriage to Lord Chancellor Selborne's breakfast in 1883:

My dear J. C.,
Will you be free
To carry me
Beside of thee,
in your Buggee,
To Selborne's Tea?
If breakfast he
Intends for we
On 2 November next, D. V.
Eighteen hundred Eighty-Three
A. D.
For Lady B.
From Cornwall G.
Will absent Be,
And says that She
Would rather see
Her husband be—
D dash dash D—
Than send to London Her Buggee
For such a melancholy spree
As Selborne's Toast and Selborne's Tea.

S.

The Temple.

The Twenty First and Last Annual Meeting of the Conference of Bar Association Delegates, at Boston

IN PRONOUNCING a valedictory at the twenty-first and last annual meeting of the Conference of Bar Association Delegates, Chairman E. Smythe Gambrell said that the Conference, "like those of our illustrious leaders who are now departed, is but a passing instrument of a process that outlives our fleeting hour." The occasion was the dinner given Monday evening, August 24, in Boston. The program included an address by Dean Roscoe Pound which traced bar organization since the Middle Ages, and was published in the JOURNAL for November; and also an address by Judge Merrill E. Otis.

A brief account of the proceedings of the regular meeting held on the following day will conclude the history of this Section.

For the forenoon a program had been arranged by Chairman Carl B. Rix, of the committee on State Bar Integration, which brought representatives of the bars in five states to tell what integration had afforded in concrete terms. The speakers and their states were: Charles A. Beardsley, Calif.; O. B. Thorgrimson, Wash.; Boyle G. Clark, Mo.; Roberts P. Hudson, Mich.; Douglas Arant, Ala. Mr. Arthur T. Vanderbilt also spoke, presenting an excellent picture of the American legal profession from early Colonial times until effective organization was accomplished.

Chairman Rix summed up with a convincing argument to the effect that the long pursued campaign for national bar coordination has now become a campaign for obtaining inclusive organization of the profession in all of the remaining states, as the only means for bringing all practitioners into the existing national organization.

While the Conference of Delegates was liquidated, there was created at the same time the Section on Bar Organization Activities as its heir and successor.

A pamphlet containing the addresses above mentioned has been prepared and copies are obtainable from the American Bar Association's headquarters office, and from the office of the undersigned Secretary of the new Section.

The afternoon session was devoted to a symposium on The Proper Conduct of Trials, and Publicity in Relation Thereto, committee reports, and Chairman Gambrell's address.

The addresses concerning trials and publicity constituted one of the big features of the convention, and, fortunately, were presented to a very large audience. The speakers were Judge Thomas D. Thacher, Mr. Frank J. Hogan, and Sir Willmot Lewis, who for sixteen years has represented the *London Times* at Washington. The Conference of Delegates had opened this subject in 1924, and kept it alive until it became an accepted issue for the entire bar. Mr. Giles Patterson, chairman of the special committee, had charge of the symposium. The three eminent speakers all concurred in the theory that the judges have the power to prevent improper reporting of trials and that the bar has a duty to perform in stimulating judges everywhere to use their proper power of restraint.

For the committee on Bar Association Activities Chairman R. Allan Stephens reported the dissemination of news throughout the year for the benefit of hundreds of associations, which work has helped to stimulate a nationwide movement.

Chairman Frank W. Grinnell reported on the special work of the committee on Rule-Making Power, which began several years ago to assist in establishing contacts between the bar and the United States Supreme Court, with the result that a foundation was laid for the cooperation of practitioners with the Court's present Advisory Committee on Rules. The point was made that the draft rules as published contain (p. 170) "Rule A," which provides for a standing committee on rules to be appointed by the Supreme Court and to meet at least once each year to consider all proposals for modification or amendment of the federal court rules and any other matters submitted to it. The committee so constituted will have power to initiate recommendations for amendments and file an annual report.

The work done by this committee, extending over ten years, has been of very great significance, and should now be taken over by an appropriate committee or section of the Association.

Judge John Perry Wood, who, as chairman of the committee on Judicial Selection, has materially assisted in the movement throughout the states for a non-political judiciary, submitted a report which summarized conclusions as follows: (1) direct election of judges should be supplanted by a less hazardous and more effective method; (2) there should be no unrestricted appointment by a single official or agency; (3) confirmation alone is not a sufficient check; (4) limiting appointment to a list made by a qualified nominating body supplies the best check on appointive power; (5) elections should not be between contesting candidates, but upon the question of retention or retirement of the incumbent; (6) appointments so made should be subject to a veto or confirmation by voters at a subsequent election; (7) a more practical mode of removal than impeachment is needed; (8) for courts of a number of judges provision should be made for a directing judicial head, not selected by his fellows, and with adequate powers.

For the Committee on Bar Reorganization, Chairman David A. Simmons reported concisely that the committee's formal report recomended that there be a House of Delegates, and that there be organized, as successor to the Conference of Delegates, a section on Bar Organization Activities. The one was an accomplished fact, the other was about to be effected. The personnel of officers and council members of the new section were published in the JOURNAL for November (p. 827).

It may be said as a last word that the Conference of Bar Association Delegates demonstrated the worth of a representative body, and especially in pioneer work. In its early years it produced a thorough brief on unlawful practice; in 1924 it brought about a conference with eminent newspaper editors and continually maintained contacts looking toward relief from improper reporting of cases; for ten years it aided in the creation of judicial councils and expounded the principles of judicial rule-making; for sixteen years it supported the bar integration movement; and for nearly as long it advocated that reorganization of the American Bar Association which we term "coordination."

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Oregon

ROBERT F. MAGUIRE, *Chairman*, Public Service Bldg., Portland.

JAMES W. CRAWFORD, Court House, Portland.
JAMES T. DONALD, Sommer Bldg., Baker.
A. N. ORCUTT, Umpqua Savings & Loan Bldg., Roseburg.
CUSTER E. ROSS, First National Bank Bldg., Salem.

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ROY G. BOSTWICK, Grant Bldg., Pittsburgh.
JOSEPH F. GUNSTER, Scranton Life Bldg., Scranton.
EDGAR S. McKAIG, Integrity Bldg., Philadelphia.
JOHN C. YOUNGMAN, 25 West Third St., Williamsport.

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CALVIN W. RAWLINGS, Judge Bldg., Salt Lake City.
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Wyoming

MARION A. KLINE, *Chairman*, Majestic Bldg., Cheyenne.
CLARENCE A. BRIMMER, First National Bank Bldg., Rawlins.
CHARLES ELMER LANE, Hynds Bldg., Cheyenne.
ALBERT W. MCCOLLOUGH, Albany National Bank Bldg., Laramie.
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Letters of Interest

A Declaratory Judgment for Procedure

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The writer has made the suggestion to the Advisory Committee on Rules for Civil Procedure charged with drafting the proposed new Federal Rules that those rules should include a provision for a declaratory judgment as to procedure. The substance of such a provision would permit any party to request a ruling from the judge as to the proper procedure to be followed in the case then pending. After notice to other interested parties (unless the question involved was one as to the issuance or service of process, where the matter would have to be decided *ex parte*) the judge should enter an order prescribing a rule for the situation presented, which would be reviewable on appeal only where an outrageous result was reached and a party deprived of some substantial benefit to which he was clearly entitled.

The necessity for such a provision in a new code of procedure, which to a great many lawyers will constitute a wide departure from a familiar procedure, appears obvious. Its desirability in any code of procedure seems demonstrable.

A new code is bound to be ambiguous and its exact meaning in the course of its administration will be subject to controversy. There is every reason why such controversy should be definitely settled during the pleading stage of the proceeding. It is true that the proposed rules seek to minimize the effect of procedural errors, and to give the trial judge power to compel compliance with the rules there announced. Those provisions, however, relate always to an attempted administration of the rules therein promulgated. Over and above those rules the trial court should have the power in case of doubt, or in a case where the situation is not covered by one of the rules promulgated by the Supreme Court, to make a rule for the case at hand which would not be a purported administration of any of the promulgated rules.

It will, of course, be found that situations will develop where no rule is provided. The Supreme Court when such defect is found may well take care of the situation by an amendment to the adopted rules. In the meantime the trial courts should be given express power to deal with such a situation in the manner suggested and thus avoid a great deal of prolonged litigation over strictly procedural matters.

The proposed rules are purposely stated in broad terms. Language being what it is there will at the beginning at least be considerable controversy as to its exact meaning. Power to define the terms used for the purposes of a pending case should be given the trial courts, not as an administration of the rules, but as a power to prescribe a rule for the case at hand.

Where the rule is in terms broad, but intelligible, its specific application will cause difficulty. For example, proposed rule 13 (b) provides for the pleading of "affirmative defenses." In the cases of contract and statutory rights this presumably continues the distinctions between a condition precedent and a condition subsequent, between limitations and an exception or a proviso. Before the case is disposed of the trial court will be called upon to rule whether the situation presented involves one or the other. A plaintiff or a defendant must now take chances on what that ruling will be when the question is raised during the trial. There is every reason why some method should be provided whereby such questions, and other similar ones, can be finally settled before trial.

The same considerations which support a declaratory judgment as to substantive rights support a declaratory judgment as to procedure.

BERNARD C. GAVIT.
University of Indiana.

The Soviet Constitution on Paper and in Reality

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The article commencing on page 589 of the September issue of the JOURNAL in relation to the projected Soviet Constitution, is another instance of the publication of a half truth and leads an uninformed reader to believe that the majority of the citizens of the Soviet Union must be perfectly happy and satisfied with a centrally dictated government: social, political and economic. The fact that the control of the Communist Party is such that free expression of the will of the people is constitutionally impossible, is not made clear. Either the Constitution as published in the *New York Times* was a distorted or incomplete translation, or the review in the JOURNAL was hurriedly written, otherwise it certainly would not have extolled the document as being "noteworthy for the civil liberties which it guarantees and the universal suffrage which it provides."

One aspect of civil liberty is the freedom of the people to join together in political organizations. By clause 126 of the projected constitution, legality of political organization is limited to the Communist Party, and it is further reserved to the members of the Party to control all executive positions in state employment, as well as in the trade-unions, cooperative societies, and other public or semi-public organizations. Furthermore, the type of club or semi-public organization which can be formed by the people, is regulated by the Constitution. Clause 126 provides:

"For the benefit of the working masses and to induce the mass of the people to organize themselves and to take part in political activities, the citizens of the USSR are granted the right to form social societies: trade-unions, cooperative societies, youth organizations, cultural, technical and scientific societies, and the most active and conscious citizens from the ranks of the

working class and other elements of the working masses may join in the Communist Party of the USSR, to stand forth as the advance detachment of the working masses in the fight to strengthen and spread socialism and in the establishment of the executive 'kernels' for all organizations of the working masses, social as well as governmental."

In other words, all public activities are entirely dependent on the Communist Party. The Party rules provide a strict obedience of all individual members to the edicts of the executive committee. Does such a constitutional provision indicate "civil liberty?"

As to universal suffrage, it is meaningless, in view of the fact that nominations for workers' delegates are controlled by the Communist Party which has a monopoly on legality. For example, Clause 141, of the Constitution provides:

"Candidates shall be nominated by election districts. The right to nominate is limited to social organizations and societies of the working masses: organizations of the Communist Party, trade-unions, cooperatives, youth organizations and cultural societies."

It will be noted that even the technical and scientific societies are not given the right to vote in the nomination of delegates. In other words, if a worker should advance in education beyond the ranks of a trade-union into a technical society, he is deprived of the right of nomination.

According to the Soviet press, one of the Siberian members of the Communist Party dared to say that the chief right of a Party member was to sit in an unventilated smoke-filled room, listen to the vaporings of "comrades," and to stultify his creative powers by "yessing" the orders from Moscow. Needless to say, the writer was quickly ejected from the Party, the editor of the paper publishing his remarks was demoted, and the censor of the district was strongly condemned.

The continued tendency of the capitalistic press to give publicity to the favorable aspects of socialism, while omitting entirely its faults or glossing them over, is incomprehensible. Please pardon this letter but I just could not resist commenting on the review published in the JOURNAL.

KENNETH M. THORPE.

Kansas City, Mo., Aug. 29.

News of the Bar Associations

California State Bar at Annual Meeting Votes for Plebiscite of Members on Higher Educational Standards—Establishment of House of Delegates to Be Considered—Senator Pepper Delivers Address

THE ninth annual meeting of the California State Bar was called to order by President Theodore P. Wittschen of Oakland on Thursday, Oct. 1. James B. Abbey, Vice-President of the Bar Association of San Diego, presented Mayor D. H. Cameron of Coronado, who in turn introduced Mayor P. J. Benbough of San Diego.

President Wittschen's annual address, dealing particularly with bar discipline, unlawful practice, admissions to the bar, and the administration of justice, was followed by an outline by Charles A. Beardsley, of Oakland, of the new Constitution adopted by the American Bar Association.

At the afternoon session Chief Justice Waste administered the oath of office to the following five members-elect of the Board of Governors: Milton Marks of San Francisco, Laselle Thornburgh of Santa Barbara, Paul Vallee of Los Angeles, Newton M. Todd of Long Beach, and H. L. Thompson of Riverside.

Dean Edwin D. Dickinson of the School of Jurisprudence, University of California, delivered a formal address, "Education for the Bar."

On Thursday night a reception and banquet were held, the latter enlivened by a floor show presented under the auspices of the Bar Association of San Diego. At the business sessions of the Convention, committee reports on educational standards for admission to the bar and cooperation between the law schools and the State Bar were presented by Alfred L. Bartlett, of Los Angeles; on the administration of Justice, by Guy Richards Crump of Los Angeles; on the "treaty" with the title companies, by H. C. Wyckoff of Watsonville; and on the activities of The Conference of Bar Association Delegates, by its retiring Chairman, Florence M. McAuliffe, of San Francisco.

Proposals for higher standards of admission, for changes in Appellate Court organization and procedure, and for changes in the qualifications of those seeking judicial office were sent to the Conference of Bar Association Delegates, which acted upon them at its night session, and reported back to the general meeting of Friday.

ALFRED L. BARTLETT
President, California State Bar

Board Governor Richard Belcher of Marysville presided over the "open forum" session in the afternoon.

Plebiscite on Higher Educational Standards

The following resolution, reported by the Conference, was adopted:

"First, that general educational standards for admission to the bar should require of all applicants that before beginning the study of law they shall have completed at least two years of college work acceptable to the University of California for admission to its junior year, or the equivalent thereof, which equivalent shall be determined by the University of California;

"Second, that legal educational standards for admission to the bar should require of all applicants, not only that they pass a final and comprehensive bar examination, but also either

"(1) That they be graduates of such law schools as may be approved by the American Bar Association, or of such other law schools as may be approved by the Committee of Bar Examiners, or

"(2) If they study law outside of such approved law schools, that they study law diligently and in good faith for at least four years, that they register with the Committee of Bar Examiners before beginning such study of law, and that they be required to take and pass examinations from time to time during such study, which examinations shall be

conducted by the Committee of Bar Examiners or under its supervision or direction;

"Third, that the operation of such standards be subject to such rules and regulations as may be reasonable and proper for the purpose of making the same effective, and for the purpose of eliminating any undue hardship to persons who in good faith began the study of law before the effective date of such standards;

"Fourth, that the Board of Governors be requested to conduct a plebiscite of the members of The State Bar upon the adoption of such educational standards, and that, if the adoption of such standards is approved by a majority of the members of The State Bar voting in said plebiscite, the Board of Governors be requested to cause appropriate legislation to be drafted for the purpose of providing for the adoption of such standards and that the California Legislature be urged to pass such legislation at its next session."

Establishment of House of Delegates to Be Considered

Another Conference resolution which was approved provided "that a Committee be appointed to consider the advisability of amending the State Bar Act (a) so as to constitute the annual meeting of The State Bar a representative body of delegates selected proportionately by the members of The State Bar in the several counties and (b) to provide that the acts of the delegates shall have something more than recommendatory effect upon the Board of Governors;" also that such Committee report at the 1937 Conference of Bar Association Delegates and meeting of The State Bar, and if either or both of the above is approved by the Committee, that the form of necessary legislation be submitted therewith.

The resolution explicitly stated, however, that its passage should not be deemed to be an adverse criticism of the present Constitution of The State Bar of California.

Numerous other resolutions were adopted and a number rejected. One urged a constitutional amendment providing that judges of the Supreme Court, District Courts of Appeal, Superior Court and Municipal Court must have practiced law for at least two years preceding election or appointment to office. Another requested the Board of Governors to permit the Conference of Bar Delegates to maintain a legislative representative for the Conference of Bar Delegates at Sacramento during legislative sessions, such legislative representative to contact the members of this Conference and the bar associations of this State represented in the Conference with respect to pending legislation of interest to the legal profession.

Senator Pepper Delivers Morrison Foundation Address

Friday evening was made memorable by the delivery of the Alexander F. Morrison Foundation Address. The guest speaker was George Wharton Pepper of Philadelphia, former United States Senator from Pennsylvania. He was presented by Chief Justice Waste, whose graceful remarks included a warm tribute to Alexander F. Morrison, and to the generous founders. Senator Pepper made a profound impression.

Retiring President Wittschen presided over the final deliberations on Saturday. Following the hearty amenities appropriate to the occasion, the ninth annual meeting stood adjourned.

Theodore P. Wittschen presided over the traditional President's dinner Wednesday evening, September 30, with the past, present and newly elected members of the Board of Governors in attendance.

The Conference on Bar Admission Problems convened on Wednesday. This was a joint meeting of the Conference of California Law School instructors (Robert L. McWilliams of San Francisco, chairman, and Sheldon D. Elliott of Los Angeles, secretary—both re-elected for the ensuing year); of the Committee of Bar Examiners, Dave F. Smith of Los Angeles, chairman, and of the Committees on Educational Standards and on Cooperation with the California Law Schools, of both of which Alfred L. Bartlett of Los Angeles was chairman. Higher standards for admission formed the outstanding problem for consideration, with strong recommendations in favor of the action taken at the general meeting of the bar.

The California Judges' Association was called together by its President, James H. Pope, Judge of the Municipal Court of Los Angeles. Among other things, the judges dealt with the problem of expert witnesses. James G. Conlan, judge of the Superior Court of San Francisco, was elected President to succeed Judge Pope. Other officers chosen: Superior Judge Maurice T. Dooling of Hollister, first Vice-President; Homer Spence, Associate Justice of First District Court of Appeal, San Francisco, Second Vice-President; Superior Judge Lewis Howell Smith of Los Angeles, third Vice-President, and Superior Judge Joseph P. Sproul of Los Angeles, Secretary-Treasurer.

The Junior Conference of The State Bar was convened with W. I. Gilbert, Jr., of Los Angeles in the chair. It discussed, among other problems, a change in the qualification of those seeking judicial office, and a proposal to permit one peremptory challenge with a view to disqualifying a trial judge. New officers elected were: Francis L. Cross of San Francisco, President; Charles Crail, Jr., of Los Angeles, Ben K. Lerer, San Francisco, and William A. Glen of San Diego, Vice-Presidents; the following Executive Committee: First District, John F. Turner, Oakland; Second District, Harry O. Wallace, Long Beach; Third District, John M. Welsh, Sacramento; Fourth District, Vincent Whelan, San Diego; and Adron Beene, Palo Alto, Secretary.

Missouri Bar Association Holds Fifty-Sixth Annual Meeting—Judge Stone Points Out Bar's Greatest Opportunity for Public Service—Committee Urges Supreme Court to Raise Admission Requirements

THE Fifty-sixth Annual Meeting of the Missouri Bar Association was called to order in the Municipal Auditorium at Kansas City, Missouri, on October 8, by President Armwell L. Cooper. The invocation was given by the Very Rev. Monsignor Keyes, and addresses of welcome were delivered by Mayor Bryce B. Smith of Kansas City and Judge Kimbrough Stone, Presiding Justice of the Circuit Court of Appeals of that circuit.

The Greatest Opportunity for Public Service

Judge Stone declared that it seemed to him that the greatest of all the opportunities for public service open to the Bar, and particularly to the organized bar, where the efforts of the individuals can be made effective, is the education of our people as to what our Constitution really is, so that in reaching any determinations they will do it as well advised as possible. He said that the more they got acquainted with it the more they would admire its structure, whether that be embodied in the terms of the Constitution itself or in the decisions of the Supreme Court construing it.

He continued in part: "I think they will admire in particular, those provisions for the amendment of the Constitution. To my mind those provisions are certainly as important as any others there. All of the rest of the Constitution is the building up of an active living form of government. The provisions as to amendments in an orderly,

proper way, which will not disturb the even course of the government, are the guarantees of the perpetuity of this government.

"There can be no quarrel with any man who wants to amend the constitution. All that is asked of him is to say what that amendment is to be that we may discuss it and see if it is wise or unwise. It seems to me if the people thoroughly understand these matters about their Constitution, we will have no trouble. When they come to decide these various questions through their votes they will act with information, and I am sure they will act with patriotism and men who act that way will bring good results. We need not fear for the changes, if there are changes, to come in this way."

The response to the address of welcome was made by Mr. Edwin C. Orr, of Columbia, Missouri, after which President Cooper delivered a brief Presidential address. He called particular attention to the increased membership in the Missouri Bar Association which, during the past year, had been 35%. The membership of nearly every Bar Association in the country had increased but not so much as Missouri. The reason back of it is that the lawyers of the country are becoming "association-minded." Speaking broadly, "lawyers are banded together to preserve two things: our self-respect and the respect of the American people."

President Cooper Asks a Pertinent Question

President Cooper concluded with a strong assertion of the powers of the courts with respect to procedure and admissions to the Bar. On the latter point he made this pertinent inquiry: "Further, what business has some one from some unnamed county in Missouri, who can shoot from behind the laurel bushes and is an adept in the operation of a still in the sidehill caves, what right does he have to say if he goes to the Legislature, what shall be the scholastic attainments of one who is lured by a noble profession?" That right, he declared, is in the courts of the land, and they had had it since the Norman Conquest, except when they have temporarily given it up.

Mrs. Ada M. Chivvis, Chairman of the Association's Delegates to the Conference of Bar Association Delegates at Boston, reported on the proceedings of that body.

Supreme Court Urged to Raise Requirements for Admission

The report of the Committee on Legal Education and Admission to the Bar was presented by John F. Rhodes, Chairman. After a general discussion of the problems in that field, referring particularly to the over-crowded condition of the Bar in Missouri and elsewhere, it stated that remedies were not easy but that the Supreme Court does have the power to prescribe qualifications for admission and that by increasing educational requirements, both academic and legal, the number of lawyers is necessarily restricted.

It concluded with a recommendation that the Bar of Missouri urge upon the Supreme Court of the State the desirability of increasing, within the near future, its general educational requirements from two to four years of college work as a prerequisite to legal education and admission to the bar, such requirement to take effect at a time in the future, so that those now studying for the Bar may not be in anywise penalized.

Reports of other committees followed. The Committee on a New Constitution, Mr. William G. Boatright, Chairman, reported that no new Constitution was needed at this time but that it unanimously recommended the adoption of an amendment to the existing Constitution dealing with the manner of selecting members of the General Council. This proposal brought up the question of representation and caused a lively debate. The proposal was not adopted.

Expediting Trials and Appeals

The Committee on Expediting Trials and Appeals, of which J. Edward Gragg

is Chairman, reported recommendations for the abolition of terms of court in all Circuit Courts, Courts of Appeal and Supreme Court, and in favor of increasing the jurisdictional amounts of the Courts of Appeal from $7,500 to $15,000. The report pointed out the possibilities for delay occasioned by practice under the present term of court situation.

The report of the Committee on Medical Legal Matters, of which William W. Dalton is Chairman, stated that it had concerned itself principally with the two major phases of medical jurisprudence—that dealing with the medical legal problems of crime, and, secondly, that dealing with the application of medical jurisprudence and the physical sciences to the civil practice, particularly in the field of insurance, personal injury and workmen's compensation law. It had found that the members of the Medical profession are much farther advanced in their work along this line than are the lawyers.

Recommendation Raises Important Issue

During the past year the Committee had made a study of post-mortem examinations and the present system of coroners in Missouri, and had become aware of an appalling situation in which many well-meaning but untrained men were filling the office of coroner in a manner which menaced the administration of criminal justice. The report urgently recommended that the Association concern itself about the problems of this office in Missouri, and consider the recommendations which had been made years ago by the Missouri Crime Survey.

Strauss Studio

KENNETH TEASDALE
President, Missouri Bar Association

The report of the Committee on Legal Aspects of Criminology, of which Mr. Leland Hazard is Chairman, referred to a meeting of that Committee early in 1936, at which it had adopted a resolution to submit to the Judicial Council a proposal "that the Supreme Court of Missouri adopt as a rule of Court the present Missouri Code of Procedure in Criminal Cases." It was not the purpose of that proposal to approve the content of the existing Code but simply to lay the foundation for more expeditious and effective modernization of the Code by rule of court.

The Committee felt that this issue should be determined independently of the many considerations involved in any proposal for specific changes in the Code. The matter was now before the Judicial Council. The Committee did not seek to commit the Missouri Bar Association to a position on the important question of the power of the courts in this respect, but contented itself with simply raising the issue.

The report dealt with the importance of finger-printing as an aid in the administration of justice and referred to the draft of a statute which the Committee had prepared on this subject, but which the Legislature had failed to enact into law. It recommended that the Association again authorize the Committee to propose the requisite legislation at the next session.

Act for Inter-State Compacts Recommended

The Committee further recommended that it be authorized to propose to the next session of the Missouri Legislature an act for compacts with other states covering, subject to appropriate restraints and limitations, the right of a pursuing officer to make arrests in adjoining states and the right of a state to require the attendance of witnesses in criminal cases from a foreign state, and such other matters as were appropriate objects of cooperative action between states in law enforcement. The report was adopted.

The report of the Membership Committee, by Mr. Edgar Shook, Chairman, showed a gratifying increase in the membership of the Association during the past year.

The report of the Judicial Candidates Committee, by Mr. Forrest C. Donnell, Chairman, gave an account of the recent referendum with respect to candidates for judicial nomination, and concluded with the somewhat discouraging statement that the "nominee of the Republican party for judge of the Supreme Court (Division No. 1), and the nominee of the Democratic party for Judge of the Springfield Court of Appeals were each *not* the person, respectively, who received the highest number of votes of the lawyers in the referendum as their choice of the candidates for nomination of the political party."

At the beginning of the second session, Judge Fred L. Williams presented a resolution expressing the deep appreciation of the Missouri Bar Association for the high honor which had come to one of its members, Dr. Manley O. Hudson, by his election to the position of Judge in the World Court of International Justice; extending to him its most sincere congratulations, expressing its unbounded faith and confidence in his ability to render distinguished service in this behalf, and wishing him a long career on this great tribunal.

The rules were suspended, the motion was unanimously carried, and the Secretary was instructed to wire the action of the Association immediately to Dr. Hudson.

Gen. John T. Barker then made an interesting statement on the new Coordination Plan of the American Bar Association. Mr. Maurice M. Milligan followed with an address on "The Federal Prosecutor and Crime Problems." This was followed by an address on "Emergency Powers under the Constitution," by Mr. Kenneth C. Sears of Chicago.

Officers for Ensuing Year

The General Council reported the following nominations for officers for the ensuing year: President, Kenneth Teasdale, of St. Louis; Vice-President, third District, Harry Carstarphen, Hannibal; Fourth District, Col. James Hull, Platte City; Eighth District, Ben Neale, Springfield; Secretary, James Potter, Jefferson City; Treasurer, Paul Buzard,

of Kansas City. These gentlemen were thereupon duly elected.

Major Thomas F. McDonald, of St. Louis, reported for the Committee on Annotations to the Final Restatement of the American Law Institute. It showed the progress on the work in Missouri, and presented a resolution with regard to financing the cost of the Annotations for that state, which was adopted.

At this point, Mr. Will Shafroth, Director of the National Bar Program of the American Bar Association, was called to the Chair, and introduced Dean Robert L. Stearns, of the University of Colorado Law School, who delivered an address on "A Non-Partisan Judiciary." His address is printed in full in the November, 1936, issue of the Missouri Bar Journal.

A Principal Cause of Poor Law Enforcement

Judge R. E. Culver, of St. Louis, Mo., thereupon reported for the Judicial Council, dealing particularly with the way the Council has been carrying on its work and proposes to carry it on in future. The Council did not regard itself as a body set apart to formulate merely the individual or composite views of its members. It regarded itself as the agency created by the Supreme Court to formulate such changes as will meet the approval of the Bench and Bar and bring about a better and speedier administration of justice. Adoption of proposals might take time and public education, but that is the orderly way of doing things. The report did not mention any of the specific recommendations contained in the Council's report to the Supreme Court.

Referring to the many communications making proposals for changes in criminal procedure, some from lawyers but most from laymen, the report expressed the opinion that the criminal procedure is not so much in need of change as many laymen seem to think. The failure of better enforcement of the law is due rather to weakness in administration than to defects in procedure. Like our other problems, better law enforcement could not be brought about by merely changing the rules and statutes prescribing criminal procedure. The Council believed that judges and lawyers were generally agreed that a better administration of civil and criminal justice would be brought about by divorcing the selection and control of law officers entirely from politics by simplification of court procedure, where it is advisable, and by a better organization of our court system so that unnecessary delay may be avoided.

Judge David E. Blair presented the report of the Committee on Amendments, Judiciary and Procedure. The Committee referred to the work on the preliminary draft of the rules for civil procedure in the Federal District Courts, and then dealt somewhat at length with various recommendations in the report of the Judicial Council, as submitted to the Supreme Court.

One of these was for the selection of judges by judicial conventions without requiring the candidates for such offices to participate in party primary elections. This proposal, he said, had time and again met with expressions of approval in meetings of lawyers and should meet with the approval of the Association. Possibly the manner of selecting judges which was nearest to the ideal was the California system, of which Dean Stearns of Colorado had spoken.

Other recommendations of the Judicial Council which Judge Blair approved were for the amendment of the statutes so that courts may hear evidence and make findings of fact in those cases where they are called upon to review decisions of purely administrative bodies, especially those manned by laymen; for uniform requirements for service of process on corporations; for uniform Appellate Court procedure; for legislation authorizing a method of securing personal service upon, and a personal judgment against, non-residents operating motor vehicles in Missouri. The Committee's report was duly adopted.

The fourth session was devoted to the Regional Meeting of the American Bar Association, of which a report has already appeared in the AMERICAN BAR ASSOCIATION JOURNAL (November issue, p. 776).

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